THE LAW OF

VOLUNTARY SOCIETIES

AND

MUTUAL

BENEFIT INSURANCE.

BY

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PREFACE.

A work on the subject of mutual benefit insurance, especially at present, must be, to a very considerable extent, an abstract or compilation of decisions. This is largely true of all text books in the law, but it is particularly so in the field traversed by the author. Principles have been stated and discussed, wherever this seemed practicable and desirable, but whatever of value this work may possess will be found to lie in the collection of adjudicated cases. The facts and points decided in these cases the author has diligently sought to state accurately and clearly.

In treating the subject of incorporated voluntary societies, it is difficult to determine how much of the general law of corporations should be included; and, in considering the contract of mutual benefit insurance, the exercise of some discretion is required to determine how much of the law applicable to life insurance generally should be discussed. It has seemed to be the wisest course to exclude any general treatment of the law of corporations or of insurance, and to confine this work strictly to the scope indicated by its title. Such subjects, therefore, as are fully considered in standard text books on both these large topics, are here either mentioned incidentally, or not at all.

Many recent cases cited in the notes have not yet been published in the regular series of reports. Such as were published while the work was in the press are given in the table of cases, with the volume and page of the report in which each appears.

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PART I.

THE LAW OF VOLUNTARY SOCIETIES.

CHAPTER I.

Charter and Constitution.

SEC. 1. Generally.
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SEC. 7. The doctrine of *ultra vires*.

Sec. 1. Generally. The articles of incorporation of a society, and the statutes under which they are formed, are its charter, and its fundamental and organic law, subject to the constitution and general laws of the State. They fix the rights of its members, and are in the nature of a fundamental contract in form between the corporators, and, in practical effect, between the society and its members, which neither party is at liberty to violate.[1]

The society and each member of it are bound by the charter, and neither can do what it does not authorize.[2]

The articles of association of an unincorporated society bear the same relation to it that a charter bears to an incorporated society. They regulate the duties of its officers, and the duties and obligations of its members among themselves, and define the scope of its business.[3]

These articles of association are commonly called the constitution of the society, and such constitution is the fundamental law of the society, and must govern its members in all things. All by-laws, rules and regulations must be passed in conformity with its provisions, and must not be in any wise in conflict with them.[4]

[1] Bergman v. St. Paul Mutual, etc., 29 Minn. 275.

[2] Rosenberger v. Washington Mutual, etc., 87 Pa. St. 207.

[3] Bray v. Farwell, 81 N. Y., 600.

[4] Powell v. Abbott, 9 Weekly Notes of Cases 231.

Where an existing unincorporated society is chartered, and its constitution is expressly recognized by the charter, such constitution thereby becomes practically, by reference, a part of the charter.[1]

Where an unincorporated mutual benefit society procures a charter of incorporation, and, by a vote of the incorporated society, all members of the voluntary association are made members of the incorporated society without new applications, this is a reinsurance of the life of such members, on their original applications, in the incorporated society,—is a mere continuation of the contract of insurance entered into by and between the associates, in which the incorporated society takes the place of the first society.

The members so admitted into the new society have no greater rights against it, under their contract of insurance, than they had against the first society, and any fact which rendered the contract invalid as against the first society furnishes a good defense for the new society to an action upon it.

In other words, an invalid contract with an unincorporated society is not made valid by the incorporation of the members thereof, and the assumption by that corporation of the contracts of the unincorporated society.[2]

§ 2. Object of society must be authorized by organic law. The act of incorporation is to a corporation an enabling act; it gives to the corporation all the power it possesses.

A corporation is the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from the act, and to be capable of exerting its faculties only in the manner which that act authorizes.[3]

An act for the incorporation of societies can never be extended by construction to cases not reasonably within its terms.

Where an act of the legislature authorizes the formation of corporations exclusively for literary, scientific and benevolent purposes, a society organized under this act for religious purposes is not legally incorporated, and is usurping functions from which it may be ousted. There is a well defined distinction between religious purposes, and those which are merely

[1] Pulford v. Fire Department, 31 Mich. 458.

[2] Swett v. Citizens, Mutual Relief Society, 78 Me. 541: 7 Atl. Rep. 394.

[3] Head v. Ins. Co. 2 Cranch 127. Phillips on Insurance pg. 9.

literary and scientific, and religious purposes differ also from those of general benevolence.[1]

A society, the object of which is to endow the wife of each member, when he shall have married, with a sum of money equal to as many dollars as there are members of the association, to be raised by assessment on them, is not a "benevolent society" for the purposes of incorporation under laws relating to incorporation of benevolent societies.

It is clear from the plan of such a society that it is not intended to bestow any benefit or help without what is thought to be an equivalent. The undertaking of the society to pay is not in any sense benevolent, but is a *quid pro quo;* it is paid for.[2]

A society for mutual insurance may not be incorporated under laws providing for the incorporation of benevolent societies.[3]

But notwithstanding such societies so organized are not corporations *de jure*, they must, at least as between its members, be regarded as corporations *de facto*.[4]

A society for pecuniary gain, organized for the purpose of aiding its members by loans or advances of money, is not a "benevolent" or "charitable" society within the meaning of the act of 1848 of New York, providing for the incorporation of benevolent, charitable, scientific and missionary societies.[5]

§ 3. Plan of doing business must be authorized by organic law. The plans of doing business set forth in the charters of societies, while they may and do differ widely in detail, must fall within the statutes under which such corporations are organized, and the purposes of the organization must be such as are provided for in those laws.

In its articles of incorporation "The Golden Rule" declared its objects to be, among other things, to assist its members in the struggles incident to life, to secure for them in their old age mutual aid and protection, and to establish a fund for the benefit and relief of widows and orphans of deceased members.

It was held that this society having for its object in part

[1] People *ex rel.* v. Benevolent Society 41 Mich. 67; People *ex rel.* v. Benevolent Society 24 How. Pr. 216.

[2] State *ex rel.* v. Critchett et al. Minn. 32 N. W. Rep. 787.

[3] State v. Critchett, Minn. 32 N. W. Rep. 787; Foster v. Pray *et al.* Minn. 29 N.W. Rep. 155; People *ex rel* v. Nelson, 46 N. Y. 477. Folger, J. dissenting; State v. Benevolent Society, 72 Mo 146; State v. Benefit Assn. 6 Mo. App. 163; Commonwealth v. Wetherbee 105 Mass. 149.

[4] Foster v. Pray *et al.* Minn. 29 N. W. Rep. 155.

[5] People v. Nelson, 46 N. Y. 477 60 Barb. 159.

the benefit of its members generally, and not wholly the benefit of the widows, orphans, heirs and devisees of deceased members, and members who have received a permanent disability, was not properly organized under the laws providing for benefits to widows, orphans, etc., and was usurping powers not conferred upon it by law.[1]

A proceeding in the nature of a *quo warranto* was instituted against a society, alleging that it was exercising the powers and functions of an insurance company, without having complied with the insurance law. It was held that a society issuing policies on the lives of its members, payable, in case of death, to the widow, orphans, heirs and devisees of the members, and to them alone, and providing in its by-laws that each member may be assessed, for the general expense fund, in such sums as may be determined upon by the trustees, not to exceed $20 in any one year, is not a life insurance company under the statute which requires a capital of $100,000 in money or securities before transacting its business, and the act amendatory thereof.

A clause in the act under which this society was organized provided that no member should receive any money as profit or otherwise. In construing this clause, the court held that it was designed to prevent the corporation from making dividends of profits among its members, and that the payment of an officer who was a member, for services rendered, would not be "receiving money as profit."

In discussing the questions involved, the Court says: "The appellant was, no doubt, an insurance company in the general and enlarged sense of that term. It issued policies to its members, which were payable upon the death of a member whose life was insured, and did various other acts which are usually done by life insurance companies, but this did not necessarily bring it within the definition of a life insurance company, as that term is used in the act" regulating ordinary insurance companies.[2]

When the law provides that a society may furnish relief to members on account of sickness, *or other physical disability*, it is proper for the society to provide, in its contract of insurance, for relief to members who shall have attained the age of seventy-five years; the attainment of such an age is a "physical disability," within the true intent and meaning of the act.[3]

[1] The Golden Rule v. People *ex. rel*, 118 Ill., 492; People v. The Golden Rule, 114 Ill., 34.

[2] The Commercial League, etc., v. People *ex. rel.*, 90 Ill., 166.

[3] Supreme Council v. Fairman, 62 How. Pr. (N. Y.) 386.

Where the law under which a society is organized provides that the members shall, from time to time, be assessed specifically to pay such losses and expenses as may be incurred, the society may not adopt a plan of insurance, by which the members, upon advance payment of an agreed annual deposit, shall be exempted from liability to assessment to pay losses occurring during the year for which such pre-payment was made, and by which a contract of insurance may be declared forfeited, for the non-payment in advance of an annual deposit, whether an assessment during such year to pay losses may be necessary or not.

Such annual deposit paid in advance, based upon a table of mortality, and without reference to an amount necessary to pay losses that may occur during the year, is in fact a premium paid for carrying the risk, and not a specific assessment.[1]

Where the law under which a society is organized provides that the "members shall receive no money as profit," any plan or scheme by which profits are made, or divided, is unauthorized. A plan, by which annual deposits are, required to be made, and, if these annual deposits exceed the necessary expenses and losses during a given year, they are to be treated as "savings," out of which dividends are to be made to those who may then be members, is contrary to such provision of the law.[2]

Where the statute under which a society is incorporated prohibits the payment of any money to a member as profits and provides that no part of the funds collected for the payment of death benefits shall be applied to any other purpose, it is not lawful for the society to do business upon a plan by which it agrees that, at the end of ten years the tontine or guarantee fund, consisting of twenty-five per cent of death assessments collected, will be distributed equally among the surviving members of the tontine class. Such a division of the tontine fund and its accumulation of interest among the surviving members, is contrary to the provisions of the law.

The purpose of the incorporation of a society was stated, in its charter, to be as follows:

"The object or purpose of this association shall be the creation of a fund, by making mutual pledges and giving valid obligations of its members to and with each other, for their own insurance from loss by death of its members. * * * *

[1] State *ex. rel. vs.* Monitor, etc., Assn. 42, Ohio St. 555.

[2] Idem.

This association shall have no capital stock; it shall receive no premiums, nor make any dividend," etc.

An action of *quo warranto* was brought, claiming that the society was doing an insurance business not authorized by its charter. The society, by its plan of insurance, required of a member, as a condition of membership, and at the time of joining, a deposit "of one dollar for each and every year of his age, counted at his nearest birthday, which deposit shall form pledge or guaranty for the payment of assessments for death losses and annual dues."

In deciding that the society was doing such a business as was authorized by its charter, the Court says:

"But this fund is not a fund for the payment of losses, but a guaranty of the payments of the assessments.

Upon the death of a member, this guaranty deposit is paid to his beneficiary, and this in addition to and independent of the proceeds of the assessment. Upon a failure to pay his assessments, the deposit is forfeited to the company, and the interest received upon the investment of the deposit belongs to the company, and from these accumulations there may come a fund, out of which the amount which would be due in case of a death can be paid without any assessment, and provision is made for such contingency. But this provision against a large accumulation of funds in no manner changes the character of the association. Its purpose and object is still the collection of assessments from living members, to pay the beneficiary of a deceased member."[1]

§ 4. Certificate of incorporation—how the manner of doing business should be set forth. A certificate of incorporation setting forth that "the manner of carrying on the business shall be such as the association may, from time to time, prescribe by rules, regulations and by-laws, not inconsistent with the laws of the state" is not a compliance with the law of the state, which requires the certificate to show "the manner of carrying on the business of said association."[2]

§ 5. Object of society must be legal. It is evident that the law will not sanction the incorporation of a society for an illegal purpose, and will refuse to recognize the legal existance of any such society.

[1] The State *ex rel* v. Bankers', etc., Association, 23 Kan. 499.

[2] State *ex rel.* v. Central Ohio Mutual Relief Association, 29 Oh. St. 399.

The State will not permit those who are subject to its laws as individuals, to defy them as members of a society which has been brought into existence under its laws. Thus, while persons may undoubtedly meet and form societies for the purpose of effecting the modification or repeal of some obnoxious and oppressive law, still, under an act providing for the incorporation of voluntary societies, a corporation may not be formed for the purpose of opposing the enforcement of other acts, or of agitating for their repeal, or to influence legislation, or to give immunity to convicted parties, by paying their fines for them. A society formed to oppose the enforcement of the liquor laws of a state may not be incorporated.[1]

Where the object of an incorporated society was to fix and control the price of salt, and the mode in which this was to be accomplished, was by the manufacturers of salt on the Syracuse reservation leasing to the corporation the salt blocks owned by them, and thus giving control of the quantity and price to the society; it was held that the purposes of the association were in violation of law, and those concerned in it were guilty of a misdemeanor.[2]

The object of a society was declared to be "to unite acceptable young people in such a way, as to endow each with a sum of money not to exceed $6,000.00 to be paid at marriage or endowment, according to the regulations adopted." A certificate of membership in such a society providing "that no member will be entitled to any benefit whatever, who marries in less time than three months from the date of his certificate," and that "every member who shall have been in good standing, for at least three months prior to his marriage, shall be entitled to $40.00 per month upon each $1,000.00 named in his certificate, for each whole month of his membership, provided that the same shall never exceed $3,000.00, or so much thereof as shall be realized from one marriage assessment of all the members of this class,"—is not a marriage brokerage contract, but is void on grounds of public policy, as operating in undue restraint of marriage, by offering an inducement for its indefinite postponement.[3]

§ 6. When corporate existence may not be attacked. It may be stated as a general rule that the corpo-

[1] Detroit Schuetzen Band v. Detroit etc. Verein, 44 Mich. 313.

[2] Clancey v. Salt Man'f'g Co. 62 Barb. 395.

[3] White v. Equitable Nuptual Benefit Union, 76 Ala. 251; See also, *In re* Mutual Aid Association for Unmarried Persons, 15 Phil. Repts. 625; *In re* Helping Hand Marriage Association, 15 Phil. Repts. 644.

rate existence of a society may not be attacked in a collateral proceeding.

Where an action is brought on a written certificate of membership, sealed with the company's seal, signed by its president, and duly attested by its secretary, the society may not introduce evidence showing that the corporation was not fully organized at the time the certificate issued, and it is estopped by its own deed from so doing.[1]

§ 7. **The doctrine of ultra vires.** Cases involving the doctrine of *ultra vires* have arisen and, doubtless, will arise in litigation upon contracts of insurance in mutual benefit societies, and contracts of other voluntary societies, but a full discussion of such a subject is beyond the scope of this treatise.

It is sufficient here to say that there are two lines of decisions. The principle laid down in one may be stated as follows:

Where it is a simple question of authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity. The usurping or excess of corporate power is a matter to be complained of by the government, and places the society in danger of a judgment of ouster and dissolution.

The other line of cases permits either party to the contract to set up the want of power in the incorporated society to enter into such a contract—not that either party stands in a position entitling such party to take advantage of the want of such powers, but on grounds of public policy; and the defense so set up is regarded as the defense of the public, not that of the contracting party urging it.

The authorities in favor of each of these principles might be multiplied almost indefinitely, though the current of the latest decisions is decidedly in favor of the proposition as first above laid down.

It is proposed to illustrate the opposing principles only by such cases as have arisen in incorporated voluntary societies.

A mutual benefit society cannot defend against a suit on one of its contracts of life insurance upon the plea of *ultra*

[1] Mutual Aid v. Paine, Ill. 14 N. E. Rep. 42; Hagerman v. Ohio Building etc. Association, 25 Ohio State 186.

vires, when it has been receiving the assessments on the policy.[1]

A society was organized under the law of Illinois providing for societies "for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs or relatives, by consanguinity or affinity, devisees or legatees of deceased members." It issued a certificate of membership, payable to William Blue who was in no wise related to the member, Wm. R. Bailey. After Bailey's death, Blue brought an action upon the certificate, and the society set up as a defense its articles of incorporation under the above law; that plaintiff was not a legatee or devisee of Bailey and not related to him by affinity or consanguinity, etc. In discussing this plea the Supreme Court of Illinois says: "It is contended that all persons not named in the act are prohibited from becoming beneficiaries. It will be observed that the contract involved is not absolutely prohibited by statute. All that can properly be claimed is that it was not expressly authorized by the statute. The defendant voluntarily issued the policy, it received the premiums, and Bailey fully, so far as appears, performed all that his contract required him to do. So far as he is concerned, the contract is an executed one. Now, upon the death of Bailey, when the defendant is called upon to perform its part of the contract, can it refuse, and defeat a recovery, by claiming that the contract is *ultra vires?* We think the law on this question is well settled that such a defense cannot be made availing. Where the contract has been fully performed by the party contracting with the corporation, and the corporation has received the benefit from such contract, it cannot invoke the doctrine of *ultra vires* to defeat an action brought against it on such contract."[2]

An act authorized the organization of societies for the purpose of securing certain benefits "to the family or heirs of any member upon his death."

The contract of insurance showed, in the answers to interrogatories in the application, that the beneficiary named in the certificate of membership was in no way related to the member, and not in any way a member of his family, and, in the certificate, the beneficiary was described as "friend of" the member.

The Supreme Court of Michigan held that the society might,

[1] Matt v. Roman Catholic etc. Society, Iowa; 30 N. W. Rep. 799.

[2] Blomington Mut. Life Ben. Ass'n v. Blue, 120 Ill. 121; 11 N. E. Rep. 331.

in an action on the certificate, set up as a defense the want of insurable interest in the beneficiary, and says: "The association issued this certificate under circumstances which most strongly call upon the courts to enforce performance of its agreement, if certain imperative rules of public policy do not forbid. The defense set up in this case must be considered as that of the public, and not that of the defendant, as it stands in no position to interpose such a defense."[1]

§ 8. **Ultra vires continued.** Although a certificate of membership in a mutual benefit society contain the name of a creditor of the member as beneficiary, in violation of the law authorizing such societies to issue certificates for the benefit of widows, orphans, or dependents of members, yet, where the certificate recognizes that there may be a change or substitution of such beneficiaries, and provides that, in case the member survives all the original or substituted beneficiaries, the insurance shall be for the benefit of the heirs of the insured, the administrator of the insured may maintain an action on such certificate, although the petition avers that the action is for the benefit of the creditor.[2]

The opinion in this case makes one or two valuable suggestions as to the application of the doctrine of *ultra vires* to contracts of mutual benefit societies. In this opinion it is said: "The designation of beneficiaries in the policy or certificates of membership is invalid, as the statutes under which the defendant corporation was organized did not authorize it to grant insurance for the benefit of friends. But an invalid designation of beneficiaries does not render the whole contract invalid. The contract in terms recognizes that there may be a change or substitution of beneficiaries, and there is a provision that, if the member shall survive all original or substituted beneficiaries, then his membership shall be for the benefit of his legal heirs. * * * If there is no other legal designation, this may take effect. The defendant contends that the declaration avers that the action is brought for the benefit of (the creditor named in the certificate), and therefore that the action cannot be maintained. This objection cannot be supported. If the plaintiff (the administrator) receives the money, it will be a good discharge to the defendant of its liability; and the defendant will not be responsible for the proper application of the money by the plaintiff. It is to be as-

[1] Mutual Ben. Ass'n v. Hoyt, 46 Mich. 473; 9 N. W. Rep. 497.

[2] Rindge v. New England Mut. Aid Soc. Mass. 15 N. E. Rep. 628.

sumed, at this stage of the proceedings, that he will dispose of the funds properly; and he may be compelled to do so by judicial proceedings, to which the defendant would not be a necessary party. The averment that the action is brought for the benefit of (the creditor) is unnecessary, and may be disregarded."

A society in its charter declared its object to be "for the general purpose of improvement and welfare of the members and others, and for the particular object of mutual relief of the members of the association in time of sickness and distress."

It was held that, under this charter, the society might properly carry on a system of mutual benefit insurance, and make the widows of deceased members the beneficiaries of the fund raised by assessment upon its members.[1]

A society provided in its charter: "The business of said association shall be to afford relief to the widows and children of its deceased members, and to such business it shall be limited and restricted."

A member became insured in the society, designated his wife as his beneficiary, and provided in the designation that his children should take the fund, if he should survive his wife. He became indebted to the society in a large amount for money loaned him, and, by agreement between himself and the society, made a new designation, "as per assignment attached and balance if any to my wife * * * and, in case she be dead, to my children." The assignment attached was to the society to secure his indebtedness to it. Afterwards the member died in good standing as such.

The Supreme Court of Wisconsin held that his children, the wife being dead, were entitled to the whole fund, and that the loan of money by the society was in excess of its corporate powers and void.

Ryan, C. J., dissented as to the ground upon which the decision was placed, and, upon the question of the validity of the loan, held that a corporation may employ the corporate property, when it would otherwise be lying idle and profitless, for such purposes as are not alien to its primary business, may rent its waste lands, invest its unemployed capital, and place its money at deposit account, citing Brice on *Ultra Vires*, 68. He further says: "If the insurance of the husband for the benefit of his wife and children were subject to his control the corporation could lend its money to him or for his

[1] Gundlach v. Germania Mechanics Ass'n., 49 How. Pr. 190.

benefit, and take security on the contract of insurance. Whether the husband had such control, seems to be the controlling question in this case."[1]

§ **10. Ultra vires continued.** An incorporated church, may not as a corporation, engage in the sale of tickets to the public for an excursion on board a steamer which the church has chartered for the occasion. Expenses incurred, with a view of profit, and profits lost, cannot be recovered, from the owners of the vessel on their failure to make the stipulated voyage. Excursions as matter of trade or business with the public are not within the means or ends for which the church was incorporated. The measure of recovery, in a suit by the church against the owners, is the amount that has been paid as hire for the vessel.[2]

Where the charter of a society restricts its membership to persons under the age of fifty years, the society has no power to authorize the admission of members over that age, and there can be no waiver of this qualification.[3]

A Masonic lodge loaned a sum of money, and afterward brought suit to enforce its collection. The court held that there could be no recovery; that where the charter confers upon a society no power to lend money, and the society lends money without authority under its charter, and takes a promissory note to secure the repayment, the contract is void. The court says. "No action to enforce the contract, whatever form the pleader's skill may give it, can be maintained."[4]

[1] Dietrich *et al* v. Relief Association. 45 Wis, 79.

[2] Harrinan *et. al.* v. Baptist Church 63 Ga., 186.

[3] Luthe v. Farmer's M. F. Ins. Co. 55 Wis. 543.

[4] Grand Lodge F. & A. M. v. Waddill, 36 Ala. 313.

CHAPTER II.

By-Laws.

SEC. 11. Inherent power of societies to pass by-laws.
SEC 12. When by-laws are binding upon members.
SEC. 13. Concerning by-laws in general.
SEC. 14. Unwritten by-laws, custom.
SEC. 15. Construction of by-laws.
SEC. 16. } SEC. 19. } Alteration, amendment and suspension of by-laws.
SEC. 20. } SEC. 22. } The by-laws of a society must be legal.
SEC. 23. The by-laws of a society must be consistent with its charter.
SEC. 24. The by-laws of an unincorporated society must be consistent with its constitution.
SEC. 25. The by-laws of an unincorporated society must not be contrary to law.
SEC. 26. } SEC. 27. } The by-laws of an incorporated society must be reasonable and necessary.

Sec. 11. Inherent power of societies to pass by-laws. An incorporated society has inherent power to make such by-laws, rules and regulations as may be necessary to carry its charter into effect, and to accomplish the purpose for which it was organized. A grant, in general terms, of the power to make such by-laws is usually contained in the organic law of the society, or the charter founded upon it, but it is by no means necessary, and adds nothing to the inherent power of the society in that regard.

This power to make by-laws necessarily includes the power to alter and amend them, and it may be exercised by a majority of the members.

An unincorporated society, however, exists by agreement of its members, and a majority has only such powers as are conferred by the articles of association. Such a society has no inherent powers. If no provision of the contract of association gives to the majority of the members the right to alter and amend such contract, the majority has no power of legislation over the minority, and changes and additions may be made only by unanimous consent.

For this reason the articles of association usually confer upon the majority, or two-thirds of the members, the power of

legislating for the general interest of the society, and provide how, and when the constitution and by-laws may be altered and amended.

§ 12. When by-laws are binding upon members. By-laws are subject to certain laws which are set forth in detail in this chapter. Subject to these laws, the by-laws of an incorporated society regularly passed are binding upon all members. The power of government of an incorporated society is in the majority, under the contract of membership. Under this contract, a member is bound by the by-laws in force when he becomes a member, and such as shall thereafter be regularly passed. If the member shall object to such by-laws as are subsequently passed, he may resign his membership and escape the effect of them; but if he continue his membership, he is bound by them.[1]

Where the articles of association of an unincorporated society are silent as to any power to alter them, and a majority of the members vote to change them, the change so made is valid and binding as to all who voted for, assented to, or in any way acted on, or enjoyed the benefits of such change. And acquiescence in the change for a time after it has become known to a member, will be construed as an adoption of it. But such change is not binding on a protesting minority. Where, however, power is given to the majority of the members at a regular meeting to alter rules affecting the general interests of the society, changes made will be binding upon all members continuing their membership.[2]

One who becomes a member of a mutual benefit society is chargeable with knowledge of the provisions of its charter and by-laws, and is bound by them.[3]

He cannot be ignorant of them, nor can he refuse obedience to them, unless they are illegal, or require the performance of acts which the law forbids.

It is sometimes said that a member is bound to know the rules of the society. This is true, but it is not to be understood by the use of the word "rules" that reference is made to the regulations adopted by the officers of the society in regard to the transaction of business, but rather such rules as enter into the constitution of the society as provisions of its

[1] See §16.

[2] Kelhembeck v. Norddeutscher Bund, 10 Daly (N. Y.) 447.

[3] Bauer v. Samson Lodge, etc., 102 Ind., 262; 1 N. E. Rep. 571; Coles v. Iowa State Mutual, etc., 18 Iowa, 425.

charter or its by-laws. Rules in the nature of instructions to officers and agents, directing the discharge of their duties, etc., cannot be meant, but rather the rules whereby the liability and rights of members of the society are fixed, which are parts of the institution.[1]

Where the by-laws of a society set forth specifically the powers and duties committed to local agents, a member is charged with knowledge of the limits of such powers, and cannot claim that notice to one of such local agents concerning matters without the scope of his authority and duty, under such by-laws, is notice to the society.[2]

§ **13. Generally.** A by-law of an incorporated mutual benefit society must be general, and apply to all members alike. If it is invalid as to one member, it is invalid as to all.

It must stand on its own validity, and it cannot be shown, as sustaining its validity, that a dispensation was granted to a member against whom it was invalid, exempting him from its provisions, and that all the other members of the society assent to it, and are willing to be bound by it.

A member of such a society cannot be subjected to any conditions which do not apply to all alike, and cannot be compelled to receive immunity from a by-law, as a matter of grace, when he is not bound by it as a matter of right.

Upon the other hand, it is unjust to the other members that there should be personal exemptions of a general nature from any valid regulations that bind the mass of the corporators.[3]

Such a society cannot ignore its by-laws, and lawfully contract with a particular member for life-insurance on a different plan or basis than applies to all other members.[4]

Where a by-law is a mere rule of conduct in its business affairs, imposed on itself by the society for its own benefit and convenience, it may be disregarded by its officers. Where the by-laws declared that clerks should hold their offices during the pleasure of the board of directors, it was held that the board might employ a clerk for a year, and bind the company by such employment.[5]

If the charter prescribe the mode in which the by-laws shall

[1] Walsh v. Insurance Co., 30 Iowa, 133-145; Treadway v. Insurance Co., 29 Conn., 68; Hale v. Insurance Co., 6 Gray (Mass.) 169.

[2] Mitchell v. Lycoming Mutual, etc., 51 Pa. St., 402.

[3] People *ex rel.* v. Benevolent Society, 41 Mich., 69.

[4] Clevenger v. Mutual Life, etc., 2 Dak. 114.

[5] Martino v. Ins. Co., 47 N. Y. Super. Ct 520.

be made and adopted, in order to their validity, that mode must be strictly pursued. But where the charter is silent upon this point, it may adopt its by-laws in any manner it may prescribe.

When the mode of electing corporate officers is not prescribed by charter, it may be wholly ordained by by-laws.

If a mutual benefit society be composed of separate bodies, whether co-ordinate or subordinate, the by-laws and rules of the society for the management of its internal affairs, and for the adjustment of the relations between its branches, constitute the law by which they should be governed.

A by-law, to be entitled to the name, must be some regulation which operates upon all members alike. A resolution, which prohibits one particular officer of the society from inspecting its books, cannot be called a by-law.[1]

It is a general rule that the by-laws of a society are binding upon no one, except its officers and members, but where a person who deals with a society is acquainted with the methods of doing business pointed out in its by-laws for its government, he is presumed to have contracted with reference to them, and is bound by them.[2]

The by-laws of a mutual benefit society are binding upon it and all its members, and its contract for the payment of money to the widow and heirs of a deceased member is to be considered and construed with reference to its powers and duties, as fixed by its charter and the by-laws pursuant thereto; and such widow and heirs have the right to rely on the performance of such by-laws. Where a by-law of a society provided that, upon receipt of notice of the death of a member, the secretary should immediately forward to the representatives of the deceased the proper blanks and full instructions how to make proofs of death; and the society, upon notice of the death of a member, with a request to send the blanks and instructions as to the required proofs, refused to send them, on the claim that the deceased had forfeited his rights, and his certificate had been cancelled, and refused payment of the sum named therein on that ground alone, it was held that this was a waiver of the preliminary proof of death.[3]

Where the by-laws provide that no one over the age of

[1] People v. Throop, 12 Wend. 187.
[2] Cummings v. Webster, 43 Me., 463.
[3] Covenant Mut. v. Spies, 114 Ill. 192.

fifty years may become a member of the society, this qualification may be waived by the society. [1]

§ 14. **Unwritten by-laws, custom.** It is sometimes said that by-laws need not *necessarily* be in writing, but may be adopted by long continued and invariable custom. It must be remembered, however, that custom may not take the place of a by-law, but that it may be resorted to merely as evidence of the adoption of a by-law.

No custom or usage is shown, which affords any evidence of the adoption of an unwritten law, where it appears only that the society, in a particular matter, has been accustomed to act in a particular manner, but where it does not appear when, how long, or to what extent, such custom has been pursued, or whether it has been uniform, or only adopted in particular instances. Such a custom will not be construed into a by-law.

Where a society has expressly adopted a code of by-laws, other by-laws will not be implied from custom or usage. The adoption and promulgation of a code of by-laws in the ordinary way, by an express vote of the members of a society, exclude the possibility of construing additional by-laws from the mere customs, or modes of procedure, which the society may see fit to adopt in the administration of its affairs. [2]

§ 15. **Construction of by-laws.** The by-laws of mutual benefit societies should be construed liberally, and with a view to effectuate the benevolent purposes of their organization.

Where there is any ambiguity or inconsistency in the terms of such by-laws, that construction is to be given them, which is most favorable to the rights of the member.

It is for the court to decide whether a by-law is within the power of the society to pass, under the express or implied terms of its charter. [3]

Whether a by-law be reasonable, or not, is for the court to determine, and evidence to the jury on that question is inadmissible. [4]

If part of a by-law is void, and the whole forms an entirety, so that the part which is void influences the whole, the entire by-law is void. The principle that a by-law may be void in

[1] Morrison v. Odd Fellows etc. 59 Wis. 162.

[2] District Grand Lodge etc. v. Cohn, 20 Ill. App. 335.

[3] State v. Overton 24 N. J. Law, 440.

[4] Commonwealth v. Worchester 3 Pickering, (Mass). 461.

part, and valid in part, applies only when the respective portions are wholly independent of each other. [1]

§ 16. Alteration, amendment and suspension of by-laws Incorporated societies possess inherent power to alter, amend, or suspend their by-laws, provided such alteration, amendment, or suspension does not interfere with vested rights.

Subject to the same proviso, unincorporated societies may alter, amend or suspend their by-laws, in the manner and to the extent set forth in the contract of association.

Neither the majority of the members, nor the board of directors, have a right to disregard a by-law which has been properly passed; a by-law can be repealed only in the manner prescribed in the charter and by-laws.

Where the by-laws of a society provide that no changes in the by-laws shall be made, except at its annual meeting, and that none shall then be made unless two-thirds of the members present agree thereto, no change can be made except in the manner prescribed, and a change of the by-laws at the annual meeting, by a vote of less than two-thirds of the members present, is invalid, although, after the meeting is over, enough other members to make up the requisite number, request in writing to be permitted to record their votes in the affirmative. [2]

It has been held that a by-law which can be passed only by a two-thirds vote, cannot be rescinded by a bare majority. [3]

A by-law of a society, requiring a two-thirds vote to alter its by-laws, may, nevertheless, be repealed by a majority. [4]

No member of a voluntary society has any vested right in fund, where its articles of association provide that, under certain circumstances and conditions, the society will look into his claim, and grant him such relief as shall appear just and reasonable; and the society may, in the manner prescribed, change its rule for the disposition of its fund, and make a new rule, wholly different from that which before existed.[5]

[1] Angell & Ames on Corps. at section 358; State v. Curtis, 9 Nev. 325; King v. The Steward etc. 8 T. R. 356; Amesbury v. Bowditch Mutual etc. 6 Gray (Mass). 596; Rogers v. Jones, 1 Wend, (N. Y). 238.

[2] Torry *et al.* v. Baker *et al.* 1 Allen (Mass). 120.

[3] Stockdale v. School District etc. 47 Mich. 226.

[4] Richardson v. Union etc. Society, 58 N. H. 187; Com. v. Mayor of Lancaster, 5 Watts 152.

[5] Torrey, *et al* v. Baker, *et al*, 1 Allen (Mass.) 120.

§ 17. Alteration, amendment and suspension of by-laws, continued. A member of a society does not stand in the relation of a creditor to the society, and he can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief.[1]

A by-law of a society provided that a member who was taken sick, or otherwise disabled from following his usual or other employment, on application, should receive five dollars a week. In October, 1876, the following by-law was passed, according to the rules of the society; "Be it resolved, that we suspend the weekly payments of benefits to the sick members until there is $800.00 in the treasury." Plaintiff was a member at the time of the adoption of this by-law, and had been long prior thereto. He became sick in January 1877, and so continued until March 17, 1877.

The court held that this latter by-law was binding upon the plaintiff, and that he was not entitled to sick benefits unless there was $800.00 in the treasury.[1]

In 1849, plaintiff became, and ever since had been, a member of Hudson City Lodge of Odd Fellows. The constitution and by-laws, which were signed by plaintiff, provided that during the sickness of a member qualified to receive sick "benefits," he should receive, if he had attained the scarlet degree, four dollars per week after the first two weeks. The constitution also provided that the lodge might make, alter or amend its by-laws, and the manner of doing so was pointed out in the by-laws. July 9, 1878, the by-laws were regularly amended, so as to reduce the benefit of a brother who had been sick for twelve months, to one dollar per week. The plaintiff was taken sick October 5, 1875, and continued so until the commencement of this action. He was of the scarlet degree, and entitled to receive sick benefits. He was paid four dollars a week down to July 9, 1878, and after that date one dollar a week. He brought suit to recover an additional three dollars a week from July 9, 1878.

The court held that as the only contract between the plaintiff and the lodge was contained in the constitution and by-laws, they should all be considered together; that the lodge had the right to alter the by-law fixing the amount to be paid to sick members, after the plaintiff was taken sick, and that he could not receive the amount prescribed by the former one.[2]

[1] St. Patrick's etc. Society v. McVey, 92 Pa. St. 510; see also McCabe v. Father Mathew Society, 24 Hun 149.

[2] Poultney v. Backmann, 31 Hun 49, overruling 62 How. Pr. 466 and 10 Abb. N. C. 252.

The view taken by the court in this case was, that this by-law did not seek to deprive members of any rights that might have been acquired under the former by-law; it was not intended to be retroactive. The society acknowledged its liability under the former by-laws, and paid the sick member according to its terms. The new by-law was a proper one for the society to pass, and it was binding for the future upon all its members whether they were sick, or well, at the time of its passage. A member is bound by proper by-laws legally passed, whether he be sick, or well.

If the society had sought to give the by-laws a retroactive force, and to deprive him of three dollars a week for any time he had theretofore been sick, it would have been null and void.

§ **18. Same subject continued.** In Pellazzino, Guardian, etc. v. The German Catholic St. Joseph Society, it was held, in the Superior Court of Cincinnati, that an amendment to the by-laws of a mutual benefit society, providing for the payment of stated benefits for sick members, which reduces the amount of such benefits, does not affect a right to such benefit, which had become vested by the sickness of the member before the adoption of such amendment, although made by virtue of a by-law, in force when such member joined the society, permitting the amendment of any by-law.

By one of the by-laws of the society, sick members were entitled to receive three dollars per week, while unable to pursue their usual business. In October, 1881, Pellazzino, a member, became insane, and so remained. By the original by-laws of the society, the usual right to amend them was reserved; and on October 31, 1882, an amendment was duly adopted, limiting benefits to sick members to thirteen weeks in each year. The only question in the case was whether the rights of Pellazzino to benefits during his then existing inability were affected by this amendment. He was not present at, and did not agree to, its adoption. The court thought that his rights were not affected by the amendment and said:

"A right to amend was reserved. But it was a right to amend the by-laws, not to repudiate a debt. A by-law provides what the rights of members shall be in certain events, if they continue to pay their dues until such events happen; this, of course, by virtue of the reserved right, may be amended or repealed. But when the event happens, what was a

contract depending on a contingency, becomes in law a debt. The right to modify a contract does not include the right to repudiate a debt, any more than the reserved right of a legislature to repeal the charter of a corporation gives it the power to confiscate its property. The rights of Pellazzino as a member, including his contingent right to benefits, were subject to modification, whether he consented at the time or not: his rights as a creditor, when by falling ill he became one, this contingent right so becoming fixed, are not made so by the language of the contract between him and defendant, and therefore cannot be surrendered except by his consent."[1]

In an action upon the by-laws of an incorporated society, it appeared that, on the 1st of November, 1877, plaintiff was in arrears to the society for dues, but on November 14, 1877, he discharged the indebtedness On December 14, 1877, plaintiff fell sick and became entitled to benefits. These were not paid, and on February 3, 1878, a by-law was passed declaring that a person in arrears should not be entitled to benefits until three months after the deficiency should be discharged. The society claimed for the by-law a retroactive force, and refused to pay benefits for sickness within three months from Nov. 14, 1877.

The Supreme Court of New York held that the benefits due for the sickness from December 14, 1877, to February 3, 1878, were a legal debt from which it could not relieve itself by making a new by-law; that the by-law passed February 3, 1878, could not visit a punishment upon plaintiff for a fault committed months before it was enacted.[2]

§ 19. Same subject continued. A by-law of a society contained this provision, viz:

"Upon the death of one who has been a member of the association for six months last prior to his death, his widow shall be entitled to receive the sum of four dollars monthly during widowhood." A member who had been such for more than six months immediately prior to his death, died, leaving a widow surviving him.

At the time of his death, and during his membership in the society, there was a by-law of the society as follows:

"A revision or alteration of the articles of the association

[1] Pellazzino v. St. Joseph's Society, 16 Cin. Law Bul. 27.

[2] Coyle v. Fr. Mathew, etc. Soc. 17 N. Y. Weekly Dig. 17; Title to the cause is given in 29 Hun 674, but case is not reported.

can be had at a general meeting of the members thereof by a majority of the votes of the members present."

Subsequent to the death of the member, the by-law first set forth above was revised in conformity with the by-law concerning revisions and alterations, and was made to read as follows: "Upon the death of a member each person who may be a member of the society shall pay to the widow of the deceased member the sum of one dollar."

The widow sued upon the original by-law for the arrears due at the bringing of the suit, claiming that she was entitled to four dollars per month, and that the revised by-law did not affect her rights.

The Court says: "The main question is, whether the allowance to the plaintiff was not cut off by the adoption of the new article after the death of her husband. It does not attempt to do so by any language which points to such a result. It is not in form retroactive, and, upon familiar rules of interpretation, ought not to be so construed as to cut off rights already fixed. It must be conceded, I think, that the provision in favor of the plaintiff was, in all respects, binding as a contract between her husband and the association. The association undertook to pay to his widow a monthly allowance after his death, if, at the time of his death, he was a member, and had been such member for the preceding six months. After his death, it is not perceived how the association can, by adopting a new article, or by repealing the old one, relieve itself from this obligation. But, independent of this consideration, it is safe to say that the new article does not, in form or substance, attempt to repudiate its obligations when they had already been fixed by the death of one of its members."[1]

In 1862, a person became a member of a voluntary charitable association. The by-laws of the association then provided that members paying the regular assessments should be entitled to twenty-five cents per day during their sickness; that the society would pay twenty-five cents per day to the widow of each member, so long as she remained a widow; that the by-laws might be amended in conformity with certain specified rules. In 1868, said association was incorporated by act of the legislature, which provided that it might alter or change its by-laws. The by-laws in force at the time of the passage of said act, were continued in force till August, 1869, when the society adopted new by-laws, wherein it was pro-

Association, 49 How. Pr. 190.

[1]Gundlach v. Germania Mechanics

vided that such widows should receive twenty-five cents per day, until they had received $200.00. Prior to the amendment of the by-laws, on January 5, 1869, the member died, leaving his widow surviving him. She was paid $200.00 in all by the society, and, upon the failure to pay her twenty-five cents a day after she had received said sum of $200.00, she brought an action for about $200.00 against the society, being the arrears due her at the rate of twenty-five cents a day from the time she had received the $200.00, as provided in the amended by-laws, to date of bringing the action.

The Court held that the society had the right to amend its by-laws as aforesaid, and that the widow, having received said $200.00, was precluded from further recovery.

The Court says: "The regulation limiting the widow's share in this charity to $200.00, was made by a general law, and applicable to all; and there is no suggestion of fraud, or that the regulation was not wise and salutary.

We think the society were competent to make this by-law; and, having fully performed the duty imposed, the plaintiff can not recover. But in this case there was an express provision in the constitution of the society, that the by-laws might be changed, and the manner of doing it was specifically pointed out; so that the husband voluntarily became party in an association, and contributed his money with full knowledge of all the provisions in the articles of association, and fully assented to the same. There is no good reason, therefore, for claiming that the widow had a vested right which the society could not modify."[1]

§ 20. By-Laws of a society must be legal. The by-laws of a society must be consistent with the laws of

[1] Fugure v. Mutual Society of St. Joseph, 46 Vt. 362. The reasoning in this opinion is all to the effect that a society should have the right to change its by-laws in accordance with its necessities. This proposition can not be doubted. But to hold that a by-law may be changed by the society after the member has performed his part of the contract, and died, and when his beneficiary is calling upon it to perform its part of the contract, is to sanction the repudiation of a debt. If a society may repudiate its part of the contract in the manner above stated, the contract of insurance issued by it is a sham and a snare, and the sooner members of such societies are made aware of the fragile and illusory obligations for which they are paying out their money, the better it will be for them.

Legislators may not pass laws which impair the express obligations of a contract, and mutual benefit societies should not be permitted to do so.

People v. Fire Department, 31 Mich. 458; Kent v. Mining Co., 78 N. Y. 159.

the land in which it exists, or does business. In this country they must be consistent with the constitution of the United States, and the acts of Congress pursuant thereto, and the constitution, statutes and general laws of the state in which the society is organized, or is doing business.

A member is not bound by a by-law which is contrary to law, even though he may have assented to it.

Where the provisions of the constitution and by-laws of a society permit a contract of insurance to be assigned, or made payable to a stranger who has no insurable interest in the life of a member, and the laws of the state in which the contract is executed, hold such an assignment, or designation of beneficiary to be void, as against public policy, such provisions are inoperative and void.[1]

By-laws of a society, which forbid a member to work at his trade at such prices as he chooses to accept, and compel him to join in a "strike" by punishing him for refusing to do so, are void as against public policy.[2]

It is not illegal for workingmen to form and act as an association for the purpose of protecting themselves against the "encroachments" of their employers, and to agree, in furtherance of such object, not to teach others their trade unless by consent of the society.

The court says: "In the relations existing between labor and capital, the attempt by co-operation, on the one side, to increase wages by diminishing competition, or, on the other, to increase the profit due to capital, is within certain limits lawful and proper. It ceases to be so when unlawful coercion is employed to control the freedom of the individual in disposing of his labor or capital. It is not easy to give a definition which shall include every form of such coercion; it is enough that in the compact before us there is no evidence of any purpose to use such unlawful means in any form."[3]

A by-law of a society imposed a penalty for violations of its by-laws, one of which forbade any of its members to work for any person who should employ non-members. It was held that the by-law was not illegal.[4]

An association of stevedores of a port, by by-law, fixed rates

[1] Price v. Supreme Lodge, etc., Texas, 4 S. W. Rep. 633.

[2] Doyle v. Benevolent Society, 3 Hun (N. Y.) 361; Farrer v. Close, L. R. 4, Q. B. 602; Doyle v. Benevolent Society, 6 Thompson & Cook, N. Y. 88.

[3] Snow v. Wheeler, 113 Mass., 179.

[4] Commonwealth v. Hunt, 4 Met., (Mass.) 111; but see People v. Fischer, 14 Wend., (N. Y.) 9.

at which its members should work, and penalties for the violation of the by-law, to be paid to the association.

The court held the by-law valid, and the penalty recoverable.[1]

One of the by-laws of an association provided, that any member who should bind his son in a shop where non-union men were employed, should be fined, and it was held to be illegal.[2]

§ **21. Same subject continued.** The statutes of a state, which apply to corporations formed for purposes other than profit, govern incorporated mutual benefit societies, and, when these statutes provide that the term for which officers may be elected shall be one year, neither the incorporators, nor the trustees first elected, are authorized to adopt a by-law or regulation providing that they shall hold office during life.[3]

A stock exchange may make membership therein subject to the rule, that, if the member becomes insolvent, his seat may be sold for the benefit of his creditors among the other members of the board. Payments of the proceeds of such sale to such members are not preferences, void by the bankrupt law.[4]

Where the scheme of a society was the annual distribution by lot among its members of works of art purchased by their subscriptions, it was declared to be a lottery, and a violation of law.[5]

By-laws cannot be permitted to destroy or amend the express provisions of a contract of insurance, without the consent of the assured.[6]

It has been held, in many states, that, while societies may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed methods before invoking the power of the courts, it is not lawful for them to entirely prohibit members from

[1] Stevedores' Association v. Walsh, 2 Daly, (N. Y.) 1.

[2] Rigby v. Connol, L. R., 14 Chan. Div., 482-492.

[3] State v. Standard Life Ass'n, 38 Ohio St., 281.

[4] Hyde v. Woods, 94 U. S. 523.

[5] The Governors of Almshouse N. Y. v. The American Art-Union, 7 N. Y. 228.

[6] Becker v. Farmers' Mut., etc., 48 Mich., 610; Ins. Co. v. Connor, 17 Pa. St., 136; Ins. Co. v. Harvey, 45 N. H., 292; Ins. Co. v. Butler, 34 Me., 451; Morrison v. Wisconsin Odd Fellows, etc., 59 Wis., 162; 18 N. W. Rep., 13; Gundlach v. Germania Mechanics Ass'n, 49 How. Pr., 190; Pulford v. Fire Department, 31 Mich., 458.

suing to recover benefits accruing to them under the by-laws of the society, or a contract of insurance issued by it.[1]

A by-law of a society, setting aside a certain fund from which a certain sum is, upon the death of a member, to be paid to the living members holding numbers just above and just below the number of the deceased member, is illegal as being in the nature of a wagering policy.[2]

A society organized as a corporation under the laws of a state, may not by its by-laws subject itself or its members to the jurisdiction of an authority existing outside of the state, and beyond the control of its laws.

A by-law of a corporation existing under the laws of Michigan may not require its members to pay assessments levied by a supreme lodge incorporated under the laws of Kentucky.

The Court says upon the subject:

"The relator is not liable to pay the assessment. It is not competent for the respondent to subject itself, or its members, to a foreign authority in this way. There is no law of the state permitting it, nor could there be any law of the state which would subject a corporation created and existing under the laws of this state to the jurisdiction and control of a body existing in another state, and in no manner under the control of our law. The attempt of the respondent to do this is an attempt to set aside and ignore the very law of its being."[3]

A corporation of a state can not permit, by by-law, a foreign corporation to interfere in its affairs, nor can it permit its members to be disfranchised by another body outside of it for any cause or in any manner.[4]

An incorporated medical society established a tariff of fees for medical services to be performed by its members, fixed a minimum salary to be received by any member who should be appointed to any public office in a professional capacity, and adopted a by-law declaring that it should be dishonorable, and subject him to expulsion, for any member to accept any appointment at a less sum than was specified therein. The court held that the by-law was against public policy and void.[5]

A by-law providing that no member of the society should sell a gun-barrel to any person of the trade, not a member

[1]See Action on Contract, Chap. xiv.

[2]The Golden Rule v. People *ex. rel.*, 118 Ill., 492; 9 N. E. Rep, 342

[3]Lamphere v. United Workmen, 47 Mich., 429.

[4]Allunt v. High Court of Foresters, Mich: 28 N. W. Rep, 802; State *ex. rel.* Graham v. Miller, 66 Iowa, 26: 23 N. W. Rep. 241.

[5]People v. Medical Society, etc., 24 Barb., 570.

residing in London, etc., was held invalid, as being in restraint of trade.[1]

Sec. 22. Same subject continued. A by-law of a merchants' exchange, requiring its members to submit their controversies to arbitration, and prohibiting them from bringing suit in court against each other to settle their claims, has been held to be illegal.[2]

In a beneficial society known as "Good Samaritans," there was a by-law providing that, when a member should for any cause be expelled, he should be suspended in the air by means of a rope fastened around the waist. This ceremony had often been peformed upon others in the presence of a certain member, but when she was expelled, she resisted to the extent of her ability. The rope was, however, fastened around her waist, and an attempt was made to draw her up until her feet should not touch the floor, when she fainted. Those who had thus attempted to hang her were indicted, and convicted of assault and battery.

The court says: "Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying this woman would have been a battery, had the parties concerned not been members of the society of 'Good Samaritans,' it is not the less a battery because they were all members of that humane institution."[3]

By-laws or regulations are properly only rules for future action. *Ex post facto* laws are no more lawful for corporations than for states, and all by-laws contrary to the general principles of the common law, or the policy of the state, are void.

The effect of an amendment of the constitution of a corporation, which before contained no such provision, whereby it was declared that any member who should fail to pay the whole of his dues which should then be in arrears, or any indebtedness to the corporation, on or before a day named, should, from and after that day, cease absolutely to be such member, without any further action whatever of the corporation or its trustees, and that the secretary should drop the names of all such delinquent persons from the roll of members, is not that

[1] Society of Gunmakers v. Fell, Willes' Reports (Eng.) 384.

[2] State v. Union Merchants' Exchange 2, Mo. App. 96; State v. Chamber of Commerce, 20 Wis. 69; Sweeney v. Beneficial Society, 14 W. N. Cases 466-486.

[3] State v. Williams *et al.* 75 N. C. 134.

of a regulation, but of an adjudication on existing defaults, analogous to a foreclosure decree fixing a short term of payment; and it is clearly *ex post facto*, in that it enforces a new penalty beyond those existing at the time of default.[1]

A by-law made in pursuance of an express power in the charter to make such laws, is void, if contrary to the general or statute laws of the state.

Sec. 23. By-laws must be consistent with the charter. By-laws of a society inconsistent with the provisions or main objects of its charter are *ultra vires* and void.

Where, by the charter, certain classes of persons are to be benefitted, a corporation has no authority to provide by a by-law for other beneficiaries, or to exclude any class provided for by the charter.[2]

Where the charter provides that the devisees of members shall be among those who may take the benefit fund, restrictions upon the power or right of the member to make a will, are inoperative and void.[3]

Where the charter prescribes the conditions and qualifications of membership in a society, no additional conditions and qualifications may be made in the by-laws.[4]

A member of a society is not bound by a by-law which is contrary to its charter, even though he may have assented to it.[5]

The controlling consideration in determining the validity of corporate by-laws, is the nature and purpose of the corporation. If a by-law is clearly alien to its nature, and a departure from its purpose, it will be held *ultra vires*, and void; if not, and it is consistent with the general laws of the land, it will be valid.

No rules can be framed, which would be of any practical value in applying this test, but the application of it to individual cases must always remain a matter involving the exercise of sound practical judgment.

Where the statute under which a corporation was organized, required a majority of the trustees to do a corporate act, and a

[1] Pulford v. Fire Department, 31 Mich, 459.

[2] Legion of Honor v. Perry, 140 Mass. 580; Kentucky Masonic etc, v. Miller, 13 Bush. (Ky.) 489.

[3] Rand v. Masonic Mut. Relief Ass'n., 3 Mackey (D. C.) 68; See Designation of Beneficancy, post Chap. xii.

[4] People *ex rel.*, v. Benevolent Society, 41 Mich. 67; People *ex rel.*, v. Benevolent Society, 24 How. Pr. 216.

[5] People v. Benevolent Society, 24 How. Pr. (N. Y.) 216; People v. Benevolent Society, 41 Mich. 67.

by-law authorized a vacancy in the office of trustee to be filled by a less number than a majority—it was held that the by-law was contrary to the charter and void.[1]

Where the charter of a society provides that, on non-payment of an assessment, the officers may forfeit the policy, the society may, by by-law, provide that such non-payment shall work a forfeiture, in which case no action of the officers will be necessary.[2]

Where the charter of a society limits and restricts the number of "active" members which a society may have at one time, a by-law is void, which provides for the election of "contributing" members in the same manner as active members, after the active list is filled.[3]

Where the charter of a corporation provides for specific assessments to pay losses and expenses, a by-law is *ultra vires* and void, which requires the members to pay an annual deposit in advance each year, instead of assessments, and provides that the assessment liability of members shall be for each year of the term of the contract, equal in amount to the annual deposit, but in no case shall any member be assessed in one year for an amount exceeding the annual deposit.[4]

The charter of a religious society authorized the making of by-laws requisite for the good government and support of the church, and provided that no persons should have a vote in the election of its minister, except those who had been regularly admitted, and had been members of such church, twelve months preceding the election. A by-law was enacted, providing that a member of the church, whose pew rent had been in arrears for a longer time than one year prior to the election, should not be entitled to vote. This by-law was held to be valid and not contradictory to the act of incorporation. The court says: "No person is excluded from voting, unless he is in default in a matter essential to the support of the church: and he may reinstate himself in his privilege by paying his debt. Nothing is more manifestly for the good of the church than this by-law."[5]

§ 24. By-laws of unincorporated society must be consistent with its constitution. The constitution of an unincorporated society, is, as has been said, the funda-

[1] State v. Curtis, 9 Nev. 325.

[2] Equitable etc., v. McLennon, Tenn, 6 Ins. L. J. 124.

[3] Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

[4] State *ex. rel.* v. Monitor etc. Ass'n. 42 Ohio St. 555.

[5] Commonwealth v. Cain *et. al.* 5 S. & R. (Pa.) 509.

mental law of the society; and it follows, that, in case of a conflict between the constitution and the by-laws, the constitution must prevail.[1]

§ 25. By-laws of unincorporated society must not be illegal. In respect to the by-laws of an unincorporated voluntary society, the court has no visitorial power, and may not determine whether they are reasonable or unreasonable; and the only question which it may examine, is whether they have been adopted in the way which has been agreed upon by the members of the society. The court regards the members of such societies as standing, to some extent at least, in the relation of partners, and permits them to make their own compacts, when the provisions of such compacts are not contrary to the law. A member has a right to withdraw from the society at any time, should he deem its by-laws unreasonable and oppressive, but so long as he remains in the society he is bound by its laws. The theory of a voluntary society is founded upon the idea that men shall come together of their own free will and accord, and be bound by such laws as shall be passed in the manner agreed upon.

There are cases in the books where by-laws of an unincorporated society have been declared to be just and reasonable, but there are none, it is believed, where the by-laws of such societies have been held to be unreasonable and void.[2]

§ 26. By-Laws of incorporated society must be reasonable and necessary. But it is a governing rule with regard to corporations, that their by-laws must be reasonable, and all which are vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void.

The power of making by-laws binding upon all the members of a corporation, whether it reside in the majority of the body at large, or those present at a corporate meeting, or be confined by charter to a select class, is in trust for the benefit of the whole, and must therefore be exercised with discretion.[3]

In Coleman v. Knights of Honor, 18 Mo. App. 189-194, the court intimates that a member of an incorporated society may not complain that a by-law duly passed by the society is un-

[1] Powell v. Abbott, 9 Weekly Notes of Cases 231.

[2] Kehlenbeck v. Norddeutcher Bund, 10 Daly (N. Y.) 447; Harrington v. Workingmen's Society, 70 Ga. 340; Grosvenor v. United, 118 Mass. 78.

[3] Angell & Ames on Corp. at Section 347; Cartan v. Fr. Mathews etc. Soc., 3 Daly (N. Y.) 20.

reasonable, but this is clearly against both principle and authority.

In People v. Board of Trade, 80 Ill., 134, the doctrine is laid down that a court will not interfere with the enforcement of the by-laws of a society incorporated for the purposes of religion, morality, benevolence or amusement, but this case is neither in harmony with the general current of authority, nor with prior and subsequent decisions of the Supreme Court of Illinois.

Where an unincorporated society becomes incorporated under a general law, the provisions of its constitution and by-laws become subject to the rules of law governing the provisions of the constitution and by-laws of corporations. While a society remains unincorporated it may make such rules and regulations as may seem proper for the discipline of its members, but as soon as it becomes incorporated, it surrenders this power, and becomes subject to the visitorial power of the courts. In such cases, therefore, provisions of the constitution and by-laws which were binding upon the members so long as the society remained unincorporated, may become null and void, by the very fact of incorporation. The court will, upon proper application, determine whether such provisions are reasonable and necessary to effect the object for which the society was incorporated.[1]

Whether a by-law is reasonable and consistent with the law, is a question solely for the court to determine.[2]

A by-law will not be set aside as unreasonable if there is any equipoise of opinion in the matter; its unreasonableness must be demonstrably shown.[3]

A declaration for the penalty of a by-law need not aver that such by-law was necessary.[4]

A by-law is reasonable which provides that a member shall be entitled to relief, in case of disability or sickness, only from the date of his application for such relief, and not from the time such sickness or disability occurred. While in individual cases such a by-law may work a hardship, on the other hand, it is necessary for the society to make fixed and certain rules to prevent imposition on the society, either by feigned or trivial sickness, or by disability produced by causes not entit-

[1] State v. Medical Society, 38 Ga. 608.

[2] People v. Throop, 12 Wend. 186; see 10 Wend. 100, and 5 Cowen 465.

[3] State v. Union Merchant's Exchange, 2 Mo. App. 96.

[4] Coates v. Mayor etc. 7 Cowen 584.

ling the claimant to relief. It is necessary that the society should have information of the state of the applicant, and have it in its power to visit him, and inspect personally his situation.[1]

A by-law providing that the officers of the society shall withhold benefits when intemperance, debauchery, etc., are the cause of sickness, and providing that when death is caused by intemperate use of alcoholic liquors, or by debauchery, the beneficiary shall not be entitled to the fund, is reasonable and valid.[2]

Such a regulation is not a determination of the right of the member or his beneficiary. A trial of the claim may be had to determine these rights under the by-law.

A society may, by by-law, prohibit its members from indulgence in vices which multiply disease and death among them, and thus diminish its general fund, and increase the burden of assessments upon contributing members. Such provisions are not merely to regulate behavior, but strike at acts which will result in injury to the society. Where sick benefits are merely lost by reason of intemperance, membership remains in the society.

A by-law providing that sick benefits shall be paid only upon presentation of a physician's certificate of the character and duration of the illness, is reasonable, as is also a by-law providing that no benefits shall be paid unless the sickness is reported to the "sick committee" for investigation and report to the society.[3]

§ **27. Same subject continued.** A by-law of an incorporated society provided that any member who should be three months or more in arrears for dues, should be deprived of benefits for three months after liquidating the same. The Court held, that this by-law was unreasonable and void, and in discussing the question says: "Is the by-law referred to unreasonable? I think it is most decidedly so. If it provided that delinquent members should be deprived of benefits during their delinquency, it would be otherwise; but this by-law subjects the member to a *quasi* penalty after the payment of his dues and the performance of his duty, and for a prospective period of three months. * * * It is not only unreason-

[1] 3 Watts & Sargents (Pa.) 218.

[2] St. Mary's Ben. Soc. v. Burford, Admr., 70 Pa. St. 321; Harrington v. Benevolent Society, 70 Ga. 340.

[3] Harrington v. Benevolent Society, 70 Ga. 340; Van Pouche v. St. Vincent de Paul Society, Mich. 2 N. W. Rep. 863.

able, but oppressive and detrimental to the interests of the corporation, and one which, being fully understood, it seems, would prevent persons from becoming members of the society."[1]

A by-law of an incorporated society declared that "vilifying any of its members" was a crime against the society, and provided that for such vilification a member might be removed from office, fined, or expelled from the society. The object of the society was for the relief of members in case of sickness and misfortune, and to assist distressed Irishmen emigrating to the United States.

The Court held the by-law unreasonable and unnecessary for the accomplishment of the end in view, and declared it void.

The Court, in the opinion says: "Every man, who becomes a member, looks to the charter; in that he puts his faith, and not in the uncertain will of the majority of the members. The offense of vilifying a member, or a private quarrel, is totally unconnected with the affairs of the society, and therefore its punishment cannot be necessary for the good government of the corporation."[2]

In People *ex rel.* v. The Medical Society etc. 24 Barb. 571, the court held that a society chartered merely for the promotion of medical science had no right to decide what fees its members should charge for their professional services, and to expel a member who had disregarded such a regulation.

The Court says: "Can it be said with any plausibilty that the establishment of a tariff of prices for medical services was a legitimate object of the creation of the corporation, or that it was necessary, or in any degree contributed to the accomplishment of the purposes or objects for which the law authorized the corporation?"

The charter of the Board of Trade of Chicago provides that said corporation shall have the right to admit or expel such persons as it may see fit, in manner to be prescribed by the rules, regulations or by-laws thereof.

Under this power it adopted the following by-law:

"In case any member of the association, having made any business contract, either written or verbal, and failing to comply promptly with the terms of such contract, shall, upon the representation of an aggrieved member to the board of directors, accompanied with satisfactory evidence of the facts, be by them suspended from all privileges of membership in the

[1] Cartan v. Father Mathew United Ben. Soc., 3 Daly (N. Y.) 20.

[2] Commonwealth v. St. Patrick's Soc. 2 Binney (Pa.) 441.

association until such contract is equitable or satisfactorily arranged or settled, when he may be restored to membership," etc.

The court held this by-law to be reasonable, and says: "It (the charter) gives the power of expulsion, and under that power the corporation has adopted this by-law, providing that if a member fails to comply with a business contract made with another member, he shall be expelled.

This is somewhat different from the adjustment of disputes, which are properly referable to the committees of reference and arbitration. It applies to cases of non-compliance with contracts about which there is no dispute necessary to be referred to one of these committees, as there was none in the present case. It certainly cannot be said that this rule was not germane to the purposes for which the corporation was created. In our judgment, though it might sometimes operate harshly, it is well adapted to secure the object we have above named, and preserve the high character and credit of the board."

A by-law of a chamber of commerce prohibiting its members from "gathering in any public place in the vicinity of the Exchange Room" and "forming a market" for the purpose of making any trade or contract for the future delivery of grain or provisions, before the time fixed for opening the Exchange Room for general trading, or after the time fixed for closing the same, daily, is not unreasonable, or an unlawful restraint upon trade.[1]

Under the peculiar facts surrounding the organization and maintenance of the Baltimore and Ohio Employes' Relief Association, it was held that a clause of the constitution of the association, providing that before the association will pay the beneficiary of the member killed the amount of benefits due, the person legally entitled to damages for his death shall release the Baltimore and Ohio Rail Road Company from all claims for damages, was held not to be so unreasonable that a court could declare it void.[2]

A by-law of an incorporated benefit society, providing that any member who shall enlist as a soldier, or enter on board any vessel as a seaman or mariner, shall thenceforth lose his membership, is valid and reasonable, in view of the purposes of the organization, and "is not forbidden by any principle of public policy."[3]

[1] State *ex rel.* v. Milwaukee Chamber etc. 47 Wis. 670.

[2] Fuller v. B. & O. Relief Assn., Md. 10 Atl. Rep. 237.

[3] Franklin v. Commonwealth, 10 Barr (Pa.) 359; See "Actions on by-laws for benefits."

CHAPTER III.

Membership. Part I.

Sec. 28, Sec. 29. Admission into incorporated societies.
Sec. 30. Admission into unincorporated societies.
Sec. 31. Election to membership.
Sec. 32. Who are members of a mutual benefit society.
Sec. 33. Membership in religious corporations.
Sec. 34. Expulsion, suspension and amotion.
Sec. 35. Power of amotion in incorporated society.

Sec. 28 Admission into incorporated societies. As the power of admitting new members is incidental to an incorporated society, it is not necessary that such power be expressly conferred by the statute under which it is organized, or by its charter.

When the organic law of the society, and its charter are silent as to its powers in this regard, the society may admit to membership any number of persons, but when such law, or charter limits and restricts the power of admission to a particular number, it erects a barrier beyond which the society may not pass.

Where the charter of a society provides that it shall consist of not more than one hundred active members, and may bestow honorary membership on active members under such regulations as may be prescribed, the society may not create honorary members, except from active members. And when, in such case, the active membership has reached one hundred, the election of "contributing" members in the same manner as active members, is void as evasive of, and conflicting with its charter, even though the privileges of such "contributing" members be greatly limited. [1]

Where the statute of a state, under which a mutual benefit society is organized, requires that all members shall be citizens of that state, and, of course, of the United States, a clause in the charter of such society, authorizing persons who have declared their intention to become citizens of the United States to become members, is illegal. [2]

[1] Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

[2] Alsatian Beneficial Society, 35 Pa. St. 79.

It may be stated, as a general rule, that when a person has applied for membership in an incorporated society, and has been refused admission, he is without remedy to compel the society to admit him.

It would be manifestly unjust and destructive of the harmony and efficiency of such societies, to compel them to admit persons into the society merely because they possessed the qualifications set forth in the organic law. These qualifications are necessarily expressed in very general terms, and do not take into consideration many elements of character which do, or do not, make persons desirable associates and members. The succession of membership in the corporation is to be kept up by the election of proper members by those already admitted to membership, and, to the members clothed with this power and duty, the law gives the right to judge of the qualification necessary for membership. Not only are the relations between the society and its members voluntary on the part of the latter, but as a corollary to this principle, no person is required to become a member. Having never been admitted to the right of enjoyment of the property of the society, or to any interest therein, and being under no obligation to take upon himself the privileges and duties of membership, the excluded applicant has received no legal injury, and the courts have no jurisdiction to interfere, even though the exclusion seem to be the result of malice and arbitrary injustice. This power to determine whether an applicant possesses the qualifications necessary to entitle him to membership in the society, is judicial in its nature; and in determining this question, the society affects no civil or property right of the applicant; there is nothing, therefore, to invoke the visitorial power of the courts over the society.

§ 29. **Same subject.** This rule is not changed by the fact that the applicant claims to have been a member of a society with similar objects and a similar name.

A man who claims to be a Mason may not invoke the aid of a court to compel an incorporated society of Masons to admit him to membership in that society. The courts will not undertake to determine, as to this person, or that, whether he is a Mason, an Odd Fellow or a member of any organization, and whether, as such, he ought to be admitted to fellowship with an incorporated society of Masons, Odd Fellows etc. These matters must be judicially determined by the society itself. This power of judicial determination of the qualifica-

tions of an applicant for membership, is inherent in the society, and exists whether recognized in its charter, or not.[1]

But where the law provides for the formation of a society for objects of public benefit, and makes it the duty of a certain class of citizens to become members of the society, in order to enjoy certain privileges granted by the laws of the land, an entirely different case is presented.

It is evident that such a society is not voluntary. A duty is imposed, and a privilege conferred upon a certain class of citizens, and the visitorial power of the court may be invoked to inquire into the exclusion of an applicant from the rights and duties of membership.

When a party having a clear presumptive title to its enjoyment, applies to be admitted to the exercise of a franchise in such a society, the application should not be denied, unless the right of immediate expulsion, for causes then subsisting, be plain and unquestioned. The exclusion of such an applicant can be justified only by facts repelling the presumption that he was qualified for admission, or by extraneous facts, showing that, if his application had been granted, there were then subsisting causes, making "a clear case" for immediate expulsion.[2]

Where the law made it the duty of the physicians of each county in the State to form an incorporated medical society for that county, and provided that any physician who should not become a member of such society in his county, should forfeit his license, and become subject to the disabilities of unlicensed physicians, it was held that a licensed physician, having the qualifications prescribed by the by-laws, might proceed by *mandamus* to compel the society to admit him to membership, upon its refusal to do so. In the same case it was held that a licensed physician, having the prescribed qualifications, could not be excluded from the franchise, on the ground that, at a period antecedent to his application, he had advertised in the newspapers in a manner contrary to the conventional rules of the society. As he was not, at the time of the advertisement, a member of the society, he did not violate its law. "Where there is no law, there is no transgression."

The Court says: "Those who were members of the society, could not lawfully be expelled for antecedent deviation from

[1] State v. Odd Fellows etc. 8 Mo. App. 148.

[2] Bagg's case 11 Coke 99; *Ex parte* Paine 1 Hill 665; People v. Medical Society, 32 N. Y. 187.

the code. Much less could such deviation be alleged, as cause for exclusion against one who never agreed to be bound by it, and as to whom it was not merely an inoperative, but an unknown law."[1]

§ **30. Admission into unincorporated societies.** Unincorporated voluntary societies come into existence by mutual agreement of the persons forming it, and the privilege of membership is not given by statute, or derived through prescription, but is created and conferred by the organization itself. The law can not compel such a society to admit an individual to membership, and a person who has applied for admission and been excluded, is utterly without remedy at law, however arbitrary and unjust he may regard such exclusion. Such societies may prescribe the conditions upon which persons may be admitted to membership, and they are the exclusive judges as to the existence of such conditions.

The right of admission to membership is voluntary and mutual between the society and individuals desiring to become members.

No one can be compelled to join the society, or remain a member, against his wish, nor can the society be compelled to admit a person against its will. This principle is inherent in every voluntary society.

A person may become a member of an unincorporated voluntary society by paying in the prescribed amount of money, and by acting, and being treated and considered as a member, without signing the constitution, although the constitution provides that any person wishing to become a member shall sign it, if he is elected to membership.[2]

§ **31. Election to membership.** If there be no form prescribed for the election, every candidate must be proposed singly. If the names of more than one be set down in a list, and the election proposed to be made of the whole list by a single vote, such election is altogether void, although the names have been repeatedly read over, and an offer made to strike out any to which an objection should be made, and notwithstanding the election was by the unanimous consent of the entire body. For, it may be presumed that, instead of using his judgment as to the propriety of admitting an individual,

[1] People v. Medical Society, 32 N. Y. 187; See Gay v. Farmers' Mutual, etc., 51 Mich. 245.

[2] Tyrrell *et al* v. Washburn *et al*, 6 Allen (88 Mass.) 466.

which he would do in case they were separately proposed, each member, desirous of obtaining the admission of some one in particular, may compromise his opinion as to the others, and thus, persons may be introduced who would otherwise have been rejected.[1]

If a person procure his election and obtain membership in a mutual benefit society by false representations and suppression of facts concerning his state of health at the time of his application, his admission to membership is null, and he may be expelled.[2]

A by-law of an incorporated society provided that the object of a special meeting should be stated in the call. Another by-law provided that a new member must be approved by a vote of the society. A warrant which called a special meeting of the society, contained no article for the admission of new members, but contained the article: "To transact any other business that may legally come before said meeting." At this called meeting, several persons were admitted to membership, and permitted to vote. It was held that the election of such persons to membership was invalid.[3]

§ 32. Who are members of a mutual benefit society. The members of a society incorporated for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the family or heirs of deceased members, are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation, are entitled to the mutual protection and relief provided, or whose family or heirs are, in case of death, entitled to the specific relief provided for them.

The members of such a corporation are the elective and controlling body, authorized to elect trustees and other proper officers, and prescribe regulations for the government of the same.[4]

Membership in a mutual benefit society is frequently limited to the members of certain subordinate organizations and is, by the by-laws, made to depend upon the continuance of membership in such organizations. When such is the case, a member who ceases to be a member of such organization, also ceases to be a member of the mutual benefit society. The fact that,

[1] Angell and Ames on Corp., at Section 126.

[2] Morel v. La Socéité, etc., 13 Lower Canada Jurist, 1.

[3] Gray v. Christian Society, 137 Mass., 329.

[4] State v. Standard Life Assn., 38 Ohio St., 281.

after the withdrawal of the member from such organization, the society continues to carry his name on the roll of membership, to recognize him as a member, and to levy and collect assessments from him, gives him no rights against the society. Such acts on the part of the society do not operate in the nature of an estoppel, for the by-law setting forth the qualification of membership, is as binding upon the member as upon the society, and, in such a case, the by-law declares that he is no longer a member.[1]

§ 33. **Membership in religious corporations.** A right as a corporator in a religious society is obtained by a stated attendance on divine worship therein, and contributing to its support by renting a pew, or by some other mode usual in the congregation. Such a right cannot be derived by descent from the founders of the society, nor from the former contributors to, or worshipers in the same.

The association between a religious incorporation and its incorporators is voluntary on the part of the latter, and is dissolved by their withdrawing from attendance on its worship, omitting to contribute to its support, and uniting in the establishment of another like incorporation. Aliens may be corporators and trustees in a religious corporation.[2]

Membership in a church, however, is to be distinguished from membership in a religious corporation. The church is an unincorporated voluntary society, having power to adopt its own rules for admission. It is entirely independent of the religious corporation, and a person may, by stated attendance at public worship, and contributing to its support, become a member of the religious corporation, without becoming a member of the church, for whose wants the corporation provides.

This distinction between membership in a religious corporation and membership in a church whose wants are supplied by the corporation, is an important one, and must be kept in view in determining the respective rights of membership.

§ 34. **Expulsion, suspension, amotion.** Expulsion is the act of depriving a member of a society of his right of membership therein, by the vote of such society, for some violation of his duty as such, or for some offense which renders him unworthy longer to remain a member of the same.

[1] Burbank v. Boston Police Relief Association, 144 Mass., 434; Springmeier v. Benevolent Association, 5 Cin. Law Bull., 516.

[2] Cammeyer v. United German Churches, 2 Sand. Ch. (N. Y.) 186; People v. Tuthill, 31 N. Y. 550.

In an incorporated society there is a distinction between what is called *amotion*, or the right to remove an officer, which is a power inherent in every corporation, and *disfranchisement.*

The former may be exercised without interfering with the franchise, as the officer, when removed, still continues a member; but disfranchisement is an actual expulsion of the member from the body, and the taking away of his franchise. This distinction is not generally regarded in the books, and the term "amotion" is frequently used as a synonym for expulsion.

It is well, however, in view of the increasing importance of the subject of expulsion from voluntary societies, to preserve and recognize the distinction as laid down.

Suspension is a temporary expulsion, and the law regarding the suspension of members from their privileges is in all respects the same as the law governing their expulsion from membership.

While this is true, there is still a well defined distinction between suspension and expulsion.

Expulsion severs the connection between the expelled member and the society, but suspension from membership, being the temporary privation of rights and benefits, does not otherwise affect the relation of the parties. The suspended member becomes entitled to his privileges as such by lapse of time, or some act upon his part, as the payment of dues, assessments or fines, etc.; but the expelled member may be readmitted only on the terms and conditions of a new member. It is evident, therefore, that a member's duty to the society, in the absence of contrary provisions in the contract of membership, remains undiminished during the time of his suspension. He must, during all of such time, perform all the duties required of other members, and he is liable for all dues and assessments levied under the by-laws. The deprivation of all privileges and benefits by suspension, does not determine the liability of a member for such dues and assessments, by removing the consideration necessary to support the contract to pay them.

The consideration of any undertaking to pay them, is his admission into the society as a member. While certain privileges and benefits are incident to membership, there are also certain conditions upon which the enjoyment of them is made to depend. The suspended member is, then, subject to the

duties of membership, even while debarred from the enjoyment of its rights and benefits.[1]

It is sometimes argued that the power to expel implies the power to suspend, on the principle that the greater includes the less.

But the power to expel cannot justly be held to include the power to suspend, for the suspension of a member might work great injustice, by depriving him of the benefits of membership, while leaving him subject to the payment of dues, assessments, etc. Such a punishment should only be inflicted when it is provided for in the contract of membership, for the quasi-judicial powers of societies should be exercised in exact conformity with such contract.[2]

The right to fine or expel, given in a contract of membership, does not include the right to suspend.

§ 35. Power of amotion in incorporated society. Incorporated societies have inherent power to expel members in certain cases, and it follows that they have power to amove an officer of the society from the station to which he has been assigned, before the expiration of his term of office, when the interest and good government of the society require it. It is well settled that the inherent power of amotion may be exercised for three causes—

First, such as have no immediate relation to the office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise.

Secondly, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his office.

Thirdly, such as are of a mixed nature, as being not only against the duty of his office, but also indictable under the law.

Before he can be amoved for the first offense above specified, he must have been convicted in the courts of the land. But if he has fled the country before conviction, he may be removed as if convicted.[3]

In case of a mere ministerial officer appointed to hold office during the pleasure of the appointing power, he may be removed at the mere pleasure of those appointing him, without notice or charges; and the appointment of a new officer to serve in his stead is a sufficient amotion of such an officer.

[1] Palmetto Lodge v. Hubbell, 24 S. C. (2 Strob.) 457

[2] Schassberger v. Staendel, 9 Weekly Notes of Cases 379.

[3] B. & Ad., 936.

But notice, and an opportunity to be heard are necessary where the appointment is during good behavior, or for a specified time, or where charges are preferred against the officer.

Mere acts, which are a cause for amotion, do not create a vacancy until the amotion actually takes place. Where the organic law of a society, and its by-laws are silent as to the mode of proceeding in amoving an officer, reference must be had to the nature of the case, to determine what course justice requires the removing power to pursue, in exercising its jurisdiction.

Where the statute under which the society is organized provides a cause for which an officer may be removed, it is not necessary that the cause assigned for removal should be stated in the precise language of the statute; if the charge substantially embraces the cause as set forth, it is sufficient.[1]

The power of, and proceedings in amotion rest upon the same principles as in expulsion, and will not be separately treated of at length.

[1] Peoples v. Higgins, 15 Ill. 110.

Membership—Part II.

INCORPORATED SOCIETIES.

SEC. 36. Power of incorporated societies to expel members.
SEC. 37. Inherent power of expulsion.
SEC. 38. Offenses against society and the objects of its organization.
SEC. 39. Development of doctrine of inherent power—modern doctrine.
SEC. 40. Power of expulsion conferred by charter.
SEC. 41. } SEC. 44. } Breaches of corporate duty.
SEC. 45. } SEC. 46. } Expulsion from religious corporations.
SEC. 47. Surrender by a society of its right to expel its members.
SEC. 48. Reinstatement to membership in incorporated society by courts of justice.
SEC. 49. Proper remedy of expelled member for reinstatement.
SEC. 50. Mandamus a discretionary writ.
SEC. 51. Delay in applying for restoration to membership.
SEC. 52. Return to writ of mandamus.
SEC. 53. } SEC. 54. } Charges preferred against a member of an incorporated society.

§ 36. Power of incorporated societies to expel members. A member of a corporation, whether it be municipal, eleemosynary or private, is in the enjoyment of a franchise, the right to which is not derived from the body, but is created by statute, or exists by prescription, and, therefore, cannot be taken away by the act of the corporation, except in certain extreme cases.

As membership is a right conferred by statute, or derived from immemorial custom which implies the existence of a grant, it can neither be taken away by act of the corporation, nor withheld by the act of the corporation, from anyone eligible to the enjoyment of it.[1]

Where corporations are for business purposes, are founded upon private capital, and own property, the modern cases are very unanimous in holding that no stockholder may be disfranchised, and thereby be deprived of his interest in the property of the corporation, without an express authority for the purpose in the charter.

[1] Gay v. Farmers' Mutual etc., 51 Mich. 245; White v. Brownell, 4Abb. Pr. (N. S.) (N. Y.) 162; People v. Medical Society, 32 N. Y. 187. See sections 28, 29, 30.

§ 37. Inherent power of expulsion. It may be stated as a general rule that there is a power of expulsion inherent in every incorporated society. But, as held by Lord Mansfield, in the case of Rex v. The Mayor of Liverpool, 2 Burr. 723, and in a long line of subsequent cases, both in this country and in England, this power is limited to three causes:

First, Offenses as a citizen against the laws of the land; when an offense has been committed, which has no immediate relation to a members' corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men. Such are the offenses of perjury, forgery etc. But before an expulsion is made for a cause of this kind, it is necessary that the member shall have been convicted of the offense by a court or jury, according to the law of the land.

Second, Violation of duty to the society, as a *member and incorporator* thereof, such as the obliteration or alteration of its records, or acts tending to impair or destroy its title to its property, rights or privileges.

In this case he may be expelled on trial and conviction by the corporation.

Third, Breach of duty in respect alike to the corporation and the laws. This is an offense of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land.

In these cases the expulsion of the member is but the exercise of a power incident to the right of self-preservation.

It has been laid down as a rule that offenses against corporate duty consist of " things done that work to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof." Ang. & Ames. on Corp. 349- 2 Kent's Com. 297.

But as observed in People v. Medical Society, 24 Barb. (N. Y.) 571, this rule may be somewhat too restricted in some special cases, but it is the general and leading rule, and is rarely departed from. If the member does acts which are calculated to destroy the corporation, or its liberties and privileges, he may be disfranchised. He thus forfeits his right to membership.

§ 38. Offenses against society and the objects of its organization. It is very clear that the character of the act considered as an offense against the corporation, depends materially upon the nature and purpose of the corporation itself. The duties of membership should be liberally construed

with reference to the objects for which the society was incorporated. Such duties, according to Lord Mansfield, are tacit conditions annexed to the franchise of a member. Whether an act be a breach of corporate duty, or not, should be judged entirely by its effect on the objects of the society. Where a member performs an act in direct contravention of the purposes for which the charter was obtained, he may be expelled.

The authority of an incorporated society to expel its members is a matter demanding the serious and careful consideration of the courts in each particular case.

While the individual rights of those who are members should be carefully guarded and protected, and the courts should see that the powers conferred are not exceeded and abused, they should, at the same time, sustain any legitimate and proper action which may have been taken by the society, within the scope of its charter, to maintain and uphold the objects of its creation.

Societies, clubs and voluntary associations of all kinds are increasing with great rapidity in this country, and the power of expulsion is naturally developing in its application to these widely different organizations.

It seems to have been the policy of courts for many years to restrict the jurisdiction of societies over the rights of their members, but courts are now inclined to sustain the action of societies in expelling members for causes which tend to militate against their good government under their charters.

Societies may, by by-law, provide for what offenses it will exercise this inherent power of expulsion, and if such by-laws are reasonably within the causes of expulsion above set forth, the courts will hold them to be valid and binding.

§ 39. Development of doctrine of inherent power—modern doctrine. These principles now constitute the modern doctrine on the power of expulsion of members from incorporated societies. A comparison of the modern rule with the early English cases will show the growth and development of this power under the liberal application of sound principles.

The famous case of James Bagg was reported by Lord Coke in 11 Rep. 93. In *Bagg's Case* it was held by the Court of King's Bench that the power of expulsion, being judicial in its nature, must be exercised by the courts of the land in all cases, except where authority to expel its members was expressly

conferred upon the society by its charter, or was derived by prescription; and that where no such express authority existed, there must be a conviction of some offense in a court of law before the offending member might be disfranchised.

But in applying this rule, it was found to be too narrow and restricted to enable corporations properly to govern their internal matters of discipline, and to attain the objects for which they were created, and, afterward, in Rex v. Richardson, 1 Burr. 517, Lord Mansfield held the doctrine to be as has been stated.

While the more modern cases have added no new causes for which the inherent power of expulsion may be exercised, the tendency is to hold the member to a rigid observance of his duty as a corporator, and to look with more favor upon the charge against a member, of breach of corporate duty.

§ 40. Power of expulsion conferred by charter. The power of expulsion for the three causes above specified, being inherent in an incorporated society, any express power of expulsion for certain defined causes, conferred upon a society by its charter, is to be regarded as cumulative.

A society may not expel members for minor offenses without an express provision of its charter conferring upon it that right; and a general provision that the society shall have power to expel its members, confers upon it no greater power than it inherently possesses. While a general provision in the charter, that the society shall have power to expel its members, in fact confers upon the society no other or greater power than is inherent in it, the courts, in some cases, seem to be inclined to give a broader and more liberal construction to its powers when they are thus recognized in the charter.

Where the charter confers upon a society the right to expel its members, under such rules and regulations as it shall adopt, this power may not be used in an arbitrary and unjust manner, and without regard to the objects and necessities of the society. When a person becomes a member of an incorporated voluntary society, he does so with reference to the main objects of its existence, as pointed out in the charter. When an offense is totally unconnected with the affairs and objects of the society, disfranchisement cannot be necessary for the good government of the corporation.

The authority is conferred for the purpose of enabling the incorporated society to accomplish the objects of its creation,

and the power, in its exercise, is to be limited to such objects and purposes.

But corporations inherently have the power of self-protection, and the right to do those things which are necessary to accomplish the objects of its existence, and, hence, it will be seen that these general powers of expulsion, which are conferred upon societies, in reality add nothing to their inherent powers.

Courts, in their desire to give to societies a sound discretion in determining what constitutes a breach of a member's duty as a corporator, have sometimes referred to the fact that, in the case at bar, the power of expulsion was conferred by the charter; but while this tendency to be liberal in defining the offenses which fall within the breach of a member's corporate duty, is in the right direction, it cannot rightly be placed upon the ground that the power of expulsion has been extended by any general recognition in the charter. It may be confidently stated that there is no instance in which the expulsion of a member, under the general power conferred by charter, has been sustained, where the offense did not, with a reasonable and liberal construction, come within the second cause for expulsion as above set forth, viz., a breach of the member's duty to the society.

In Pennsylvania, where the approval of the Supreme Court of the state to the provisions of the charter is required before a society can become incorporated, it has been held that the Court will not approve a charter for the incorporation of a society, where the articles of incorporation contain an indefinite statement of the offenses that may result in expulsion. The court refused to approve a charter which provided that "any member may be expelled, who commits any misdemeanor, or any other act that may prove injurious to his character or standing."[1]

It refused to approve one which gave to the majority of the members the power to expel any member "guilty of any offense against the law,"[2] and one which gave to the society power to expel any member who shall be "guilty of actions which may injure the association."[3]

In re charter of Rev. David Mulholland Benevolent Society, it was held that a charter will not be approved where there is

[1] Butchers' Beneficial Association, 38 Pa. St., 298.

[2] Beneficial Association of Brotherly Unity, 38 Pa. St., 299.

[3] Butchers' Beneficial Association, 35 Pa. St., 151.

a provision in it, declaring that membership in the society shall be forfeited upon enlistment in the army or navy. In discussing such a provision, the Court says: "It is against public policy. A corporation which is a creature of the law ought not to proscribe its members for aiding the government which creates and protects it."[1] But it has been held that a by-law of an incorporated benefit society, providing that any member who shall enlist as a soldier, or enter on board any vessel as a seaman or mariner, shall thenceforth lose his membership, is valid and reasonable, in view of the purposes of the organization, and "is not forbidden by any principle of public policy."[2]

§ 41. **Breaches of corporate duty.** Where one of the objects of an incorporated society is to provide assistance and sick benefits for sick members, it is subversive of the fundamental objects of the society,—an act which tends to its destruction,—for a member to feign sickness, and draw money from the benefit fund on account of such feigned sickness, and the society has power to expel a member for such an offense.[3]

Where the main object of an incorporated mutual benefit society is to furnish life indemnity, or pecuniary benefits to widows, orphans, heirs, etc., of deceased members, indemnity for accidents, sickness or permanent disability to members thereof, the non-payment of dues and assessments is subversive of the fundamental object of the society, tends to its destruction, and is a violation of the member's duty as a corporator. Not only has such a society an inherent right to expel members for non-payment of dues and assessments, but, from its nature and necessities, it has a right to provide in its laws, that such non-payment, within a stipulated time after notice, shall, without personal or other notice to the delinquent member, *ipso facto*, work a forfeiture of all the member's rights of membership.[4]

Where an officer or a member of an incorporated society, in account with the society, charges it with money he has never paid out and disbursed, and seeks to obtain credit from the society for such fraudulent items, he is guilty of an offense against his duty as a corporator, and may be expelled.[5]

Though a person who is not a member of an incorporated

[1] 10 Phil. Rpts., 19.

[2] Franklin v. Commonwealth, 10 Barr (Pa.), 359.

[3] Society, etc., v. Meyer, 52 Pa. St., 125.

[4] Rood v. Benefit Association, 31 Fed. Rep., 62; McDonald v. Ross-Lewin, 29 Hun (N. Y.), 87; Benevolent Society v. Baldwin, 86 Ill., 479.

[5] King v. Mayor, 2 Ld. Raym. 1566; King v. Chalke, 1 Ld. Raym. 226.

mutual benefit society, owes to it no corporate duty, yet a person who applies for membership and insurance therein, is required to act in the utmost good faith. If he procure admission to membership on the false representation that he is in good health, and by suppression of the fact that he has an hereditary or incurable sickness, he commits an offense against his corporate duty by acceptance of membership and the contract of of insurance so procured by fraud, and may be expelled.[1]

Where the charter of an association stated that it was formed, among other things, "to inculcate just and equitable principles in trade," it was held that a member might be expelled for obtaining goods under false pretenses, though the offense was not committed within the local jurisdiction of the corporation, nor against a member of the association.

The Court says: "When a person became a member, and subscribed to the articles of the association, he agreed as a condition of his being associated with the company, that he would, by his example and his practice, aid in this great object and leading purpose of the corporation. This could most effectually be accomplished by a practice of integrity, honesty and fairness in commercial dealings, both in reference to the acts of the association and its members, at its place of business and elsewhere, at all times and on all occasions when engaged in trade. * * * * He had no right to make a distinction between dealing with members and strangers."[2]

§ 42. **Same subject continued.** Where a medical society, both by its charter and by-laws, has jurisdiction to inquire into and pass judgment upon the conduct of its members, and, in a proper case, to expel a member, gross immorality in a professional transaction, having a tendency to bring the profession into dishonor before the community, if distinctly charged and proved, is sufficient to justify the exercise of its power. And where a member of such a society sold out his practice and good will to another physician, and agreed not to practice medicine in the community, but soon afterward began to practice in the community, in violation of his agreement, and the society expelled him therefor, the court refused to restore him to membership.[3]

A medical society, having power by charter to expel its

[1] Morel v. La Société, 1 Lower Canada Jurist 1.

[2] People v. N. Y. Com. Assn. 18 Abb. Pr. 271; Dickenson v. Chamber of Commerce, 29 Wis. 45.

[3] Barrows v. Mass. Medical Soc' 12 Cush. 402.

members, passed a by-law providing that no homœpathic physician should be admitted as a member, and passed another by-law providing that any member might be expelled for any conduct unbecoming and unworthy an honorable physician and member of the society. Under this last by-law, a member was charged with practicing medicine according to homœpathy, and the Court held the charge sufficient under the powers and objects of the society.[1]

A member of a society, in resisting the unlawful authority of the society, commits no offense against his duty as a member.[2]

Where the charter of the Chamber of Commerce conferred upon the association the power to expel members as it should see fit, the court held that the association had no power to expel a member because he refused to submit to the arbitrament of the association, according to the by-laws, a claim against a fellow member. The Court says: "Is it necessary for the good government and management of the affairs of the corporation, that it should have power to compel him to do any such act? We cannot see that it is. On the contrary, the assumption and exercise of the power in this case strikes us very unfavorably."[3]

A Board of Trade or Chamber of Commerce, the object of which, as expressed by its charter, is to inculcate just principles in trade, may expel a member for gross violation of a contract entered into by him, even though the contract be between the member and one who is not a member, and even though the contract may be void by the Statute of Frauds.[4]

§ **43. Same subject continued.** The charter of the Board of Trade of Chicago provides that "said corporation shall have the right to admit or expel such persons as they may see fit, in the manner to be prescribed by the rules, regulations or by-laws thereof."

Under that power the corporation adopted a by-law providing that, if a member fails to comply with a business con-

[1] Gregg v. Mass. Medical Society, 111 Mass. 185.

[2] Leech v. Harris, 2 Brewster (Pa) 571.

[3] State *ex rel* v. Chamber of Commerce, 20 Wis. 63; See State v. Merchants Exchange, 2 Mo. App. 96; Sweeney v. Beneficial Society, 14 W. N. C. 466–486.

[4] Dickenson v. Chamber of Commerce, 29 Wis. 45; Blumenthal v. Cincinnati Chamber of Commerce, 7 Cin. Law Bul. 327; People v. N. Y. Commercial Association, 18 Abb. Pr. 271.

tract made with another member, upon satisfactory evidence of such fact, he shall be expelled.

The court held that, although the discretion granted by the charter to expel members is not purely arbitrary, and can be exercised only for some just and reasonable cause, yet, as this rule was germane to the purposes for which the corporation was created, a member might be expelled for non compliance with such a contract. [1]

A member having been expelled from the common council of the city of Liverpool, applied to the King's Bench for a *mandamus* to restore him. The return of the Mayor showed, as cause for expulsion, that the member had become a bankrupt. The court held that the cause was insufficient, as bankruptcy was no ground for disfranchising a member of a municipal common council. [2]

A member had vilified a fellow member, in violation of a by-law, and had been expelled therefor. The society was created for the purpose of aiding its members when in need, and of relieving distressed Irishmen emigrating to the United States. The expelled member applied to the court to be reinstated to the privileges of membership.

The Chief Justice, speaking for the court, said: "My opinion will be founded on the great and single point on which the case turns. Is this by-law necessary for the good government and support of the affairs of the corporation? I cannot think that it is. * * * *

On mature reflection it appears to me that, without an express power in the charter, no man can be disfranchised unless he has been guilty of some offense which either effects the interests or good government of the corporation, or is indictable by the law of the land." [3]

In Earl's Case, Carthew 173, it was held that a member of a corporation may not be disfranchised for any personal offense of one member to another.

Two members of an incorporated club were sitting together in conversation in the bar-room of the club-house, when a third member came in and used insulting language which was understood by one of the two to be applied to himself. He thereupon struck the offender, and was afterward expelled for the offense. The court held that the act of striking his fellow

[1] People v. Chicago Board of Trade, 45 Ill. 112.

[2] Rex v. The Mayor of Liverpool, 2 Burr. 732.

[3] Commonwealth v. St. Patrick's Benevolent Society, 2 Binney (Pa.) 448.

member was not such as would justify his expulsion from the club by the members thereof,—that mere offenses against decorum, personal offenses of one member against another, so long as they do not tend to the subversion of the government of the corporation and the management of its affairs, do not justify disfranchisement on the ground of being against the duty of the corporator. [1]

In Allnut v. High Court, etc., Mich., 28 N. W. Rep. 802, it was held that the libel of one member by another was no ground for expulsion.

§ 44. **Same subject continued.** Where a society is incorporated under a general law providing for the incorporation of benefit societies, its object is obviously civil and benevolent, and not religious, and it may not be made, directly at least, the promoter of religious discipline. While it can refuse admittance to persons who do not believe in certain religious doctrines, by rejecting their applications, yet it may not compel a person who has once been admitted to membership, to continue in that faith, and to continue to observe the discipline of any church, on pain of expulsion from the society. Such religious faith and discipline are totally unconnected with the objects of benevolent societies.

The law permits religious societies to establish rules, regulations or articles of faith, for the government of their own bodies, and he who becomes a member of such a religious society agrees to these rules, regulations and articles of faith, and to the mode of discipline and trial provided by it. But where a society is organized and incorporated for beneficial and benevolent purposes, under the statute of the state, a member may not be deprived of his rights in the society by a by-law not necessary for, or connected with the purposes and objects of the society, and relating to religious discipline, even though he may have assented to it.

In such a society, a by-law providing for the expulsion of any member who shall not twice during each year attend to his duty of private confession and reception of the Holy Communion, is *ultra vires* and void.[2]

In the case of The People v. The Medical Society of the

[1] Evans v. Philadelphia Club, 50 Pa. St. 107.

[2] People v. Franciscus Benevolent Society, 24 How. Pr. (N. Y.) 216; People v. Benevolent Society, 41 Mich. 67.

County of Erie, 24 Barb. 571, the court held that a society chartered merely for the promotion of medical science had no right to decide what fees its members should charge for their professional services, and to expel a member who had disregarded such a regulation. The Court says: "Can it be said with any plausibility that the establishment of a tariff of prices for medical services was a legitimate object of the creation of the corporation, or that it was necessary, or in any degree contributed to the accomplishment of the purposes or objects for which the law authorized the corporation?"

A member of a society, the charter and by-laws of which contain no definition of offenses against the society, or provisions for imposing penalties, may not be expelled or suspended for non-payment of a fine imposed by the society.[1]

§ 45. Expulsion from religious corporations. From the principles and authorities above set forth, it is evident that a corporation, the object of which is merely to hold the title to property, can neither admit nor expel members.

As voluntary societies frequently make use of corporations to hold their property, while they themselves perform acts entirely independent of such corporations, it is necessary that the distinction between those acts which are corporate, and those which are merely the acts of these societies, should be thoroughly understood and constantly kept in view.

In most of the states, the laws provide for the incorporation of religious societies. There is, of course, great difference between the provisions of these laws, but they are, in the main, drawn upon the same general plan.

Persons desirous of forming themselves into a religious society may sign articles of association for that purpose, agree upon a name, elect trustees, and put their articles on record when duly perfected. They thereby become a corporation by the name agreed upon, and may take, hold and convey property, and exercise the ordinary functions of corporate bodies. The corporators are not necessarily professors of any particular belief or faith, or members of any church. Corporate succession is kept up by conferring the privileges of corporators on all who regularly attend worship in the society, and contribute to its support. The trustees who are to manage the temporal affairs of the corporation may, or may not, be church members.

[1]Erd v. Bavarian Relief Ass'n., Journeyman Tailor's, etc., Union, Mich., 34 N. W. Rep., 555; Otto v. Cal., 17 Pac. Rep. 217.

Connected with the corporation there is a church organization. This is spiritual in its objects. Its name may, or may not, be identical with the name of the corporation.

This church has its voluntary members who are supposed to hold certain religious dogmas. It is not incorporated, and has nothing whatever to do with the temporalities. It does not control the property or the trustees. Membership in the corporation arises by operation of law from attendance at public worship, and contributing to the support of the corporation. The church can admit members into fellowship with it, according to its rules of admission, but it cannot receive a a person into the corporation, nor can it expel a person from the incorporated society.

On the other hand, the corporation has nothing to do with the church, except as it looks after the temporalities, and provides for the wants of the church.

It cannot alter the church faith; it cannot receive members; it cannot expel members; it cannot prevent the church from receiving or expelling whomsoever that body shall see fit to receive or expel.[1]

A religious corporation has no spiritual capacity; it is given capacity in respect to temporalities only. The rules of the church as to the discipline of members, have no relation to the corporate property or corporate matters. It has no power to try a corporator for moral delinquency, or to disfranchise him in consequence thereof.[2]

Immoral men may not usually attend divine worship, contribute to the support of religious corporations, and insist upon their rights in such societies, but, when they do, the law does not distinguish between them, and those who have been regularly admitted into the church.

The expulsion of members from unincorporated societies will be treated of further along in this chapter, but sufficient has already been said to show that a religious corporation, the sole object of which is to hold and administer property, may not expel its members.

Sec. 46. Same subject continued. Expulsion from membership in the church is effectual to exclude the member from the spiritual privileges enjoyed by its members, but it

[1] Hardin v. Baptist Church, 51 Mich. 137; Calkins v. Cheney, 92 Ill. 464.

[2] People v. German etc., Church 53 N. Y. 103; Livingston v. Trinity Church, 16 Vroom 230; Sale v. Baptist Church 62 Iowa 26.

does not, in the least, affect his status as a member of the incorporated society. If, because of his expulsion from the church, anyone should exclude him from the proper enjoyment of the property of the corporation for religious worship and instruction, he may maintain an action therefor, and, in fixing his damages, the injury to his feelings may be considered. The same course may be taken if prevented from exercising his right to vote when entitled to such right by the statute.[1]

But the excluded member must, in such cases, sue the persons who illegally excluded him. An action in damages for expulsion from the church and deprivation of church privileges, will not lie against the religious corporation connected with the church. While it is true that the church is an integral part of the corporation, it by no means follows that the corporation is chargeable with the wrongful acts of members of the church in expelling its members. Counties, towns, and school districts are integral parts of the state, but the state is not for that reason liable for their torts. The incorporated society may neither expel members from the church, nor prevent such expulsion, and it is neither liable in damages for a wrongful expulsion from the church, nor can it be proceeded against by *mandamus* to restore an expelled member to his spiritual privileges.[2]

§ 47. Surrender by a society of its right to expel its members. While it is not competent for an incorporated society, by its constitution or by-laws, to surrender absolutely its inherent power of expulsion—its right to perform an act necessary to the preservation of its existence,—it may, nevertheless, by proper laws, qualify and abridge that right, by pointing out the manner in which, and the occasions upon which, it will exercise such right. A limitation which does not deprive the incorporated society of the right to protect and preserve its franchise, is unobjectionable.

Where the constitution of an incorporated mutual benefit society provides that "the manner of suspension for the nonpayment of dues and assessments shall be detailed in the by-laws," and no by-law is adopted by the society on the subject of suspension, as required by the foregoing provision, the neglect of the society to provide a mode and manner of suspen-

[1] People v. German etc., Church, 53 N. Y. 103.

[2] Hardin v. Baptist Church, 51 Mich. 137; People v. German Church, *Supra*.

sion, prohibits it from exercising its inherent power to expel a member for failure to perform his corporate duty in the payment of dues and assessments.[1]

§ 48. Reinstatement to membership in incorporated society by courts of justice. Where the charter of a society provides for an offense, directs the mode of proceeding, and authorizes the society, on conviction of a member, to expel him, this expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by *mandamus*, action or any other mode.

The courts have jurisdiction to keep such tribunals in the line of order, and to prevent abuses, but they do not inquire into the merits of what has passed *in rem adjudicatam* in a regular course of proceeding.

The society in such a case acts judicially, and its sentence is conclusive like that of any other judicial tribunal. This is nothing more than the application to the decrees of these societies, affecting their members, of the familiar principles that obtain in relation to the validity and effect of judicial determinations of controversies between citizens in the courts. If the court has jurisdiction of the subject matter and the parties, its judgment, however erroneous on the law and the facts, concludes the parties unless appealed from.

When an expelled member resorts to a court of justice to compel the society to reinstate him, he does not appeal from the judgment of the society; courts of justice have no appellate jurisdiction in such cases.

All that he can ask the court to decide is, whether or not the charge against him was sufficient under the powers of the society, and whether the necessary steps for his expulsion were regularly taken after notice and opportunity to be heard.

The supervision which courts maintain over the right of expulsion in corporate societies, is derived from what is termed the visitorial power of courts.

In this country, the visitorial power of correcting the abuses and irregularities of incorporated societies, is vested in the courts of general jurisdiction.

The assent of the members to the provisions of the charter and by-laws is a fundamental requisite of membership, and where the right of expulsion for certain causes is conferred

[1] District Grand Lodge etc., v. Cohn, 20 Ill. App. 335.

upon the incorporated society, it may be exercised in the manner and for the purposes prescribed in its laws. But while courts will not inquire into the merits of the decisions of incoporated societies in expelling a member in the regular course of proceedings, yet, if the expulsion has been irregularly conducted, without due authority, sufficient cause, or proper notice, the courts will interfere by *mandamus* to compel the restoration of the member to his corporate franchise.[1]

It has, in one or two cases, been doubted whether membership in an incorporated society which is purely literary, social, scientific, benevolent or religious, and owns no property, is such a right as the court will protect, and whether the right of meeting the other members, and enjoying their companionship, is such a vested right as courts will take cognizance of.[2]

But it is clearly settled, both upon principle and authority, that the franchise which is vested in each member of a corporation, is a vested right and privilege which the courts will not permit such societies to abuse or destroy. In this country the franchise is granted by the State, and it will be presumed in the courts of the State that its grant is of value to its citizens.

Thus, in Fuller v. Trustees of Plainfield Academy, 6 Conn. 532, it was held that the place of trustee in an eleemosynary corporation. though no emoluments are attached to it, is yet a franchise of such a nature that a person improperly dispossessed of it is entitled to restoration, and a peremptory *mandamus* was awarded.[3]

Such a franchise is an incorporeal hereditament. All immunities and franchises are deemed valuable in law; and the owners have a legal estate and property in them, and legal remedies to support and recover them, in case of any injury to, or obstruction of them.

§ 49. Proper remedy of expelled member for reinstatement. In case of illegal disfranchisement of a

[1]People v. Mechanics' Aid Society 22 Mich. 86; State v. Chamber of Commerce, 20 Wis. 63; Commonwealth v. German Society, 15 Pa. St. 251; People v. Medical Society, 24 Barb. 570; Commonwealth v. Guardians of Poor etc., 6 Sar. & R. 469; Commonwealth v. Pa. Beneficial Society, 2 Sar. & R., 141; Commonwealth v. St. Patrick's Ben. Soc. 3 Binney 448; Society v. Commonwealth, 52 Pa. St. 125; Smiths Society v. Vandyke, 2 Whart. (Pa.) 308.

[2]People *ex rel.* Rice v. Board of Trade, 80 Ill. 134; Waring v. Medical Society, 8 Am. L. Reg. 533.

[3] See also State *ex rel.* Waring v. Medical Society, 38 Ga. 608, and many of the authorities reviewed in this chapter.

member of an incorporated society, *mandamus* is the proper remedy for his restoration. This is the settled modern rule.[1]

In Commonwealth v. Mayor, etc., 5 Watts, 152, it is said: "An action to enforce the right could not be maintained against the corporation, because performance of a corporate function is not a duty to be demanded by action; and unless recourse could be had to the functionary in the first instance, the relator might have a cause for redress without a remedy."

The discharge of a corporate duty is treated as an office or function, and the corporation as a functionary.

A corporate society having been created, invested with certain powers, and charged with certain duties to be performed for the benefit of its members and the public, is not a private individual, in the ordinary sense of the word, so that an action which would be a sufficient remedy between individuals to enforce private rights, would be a sufficient remedy against it.

A member of an incorporated society, whose rights are withheld, or violated by the society, and who is without other remedy, is entitled to the writ of *mandamus*.

When a member has been expelled from a society, and seeks to be restored to membership, it is necessary for him to show, both in pleading and in evidence, that he was, at some time, a member of the society. If he shows that the society, at some time, recognized him as a member, this is sufficient to cast upon the society the burden of showing a legal expulsion of the member.

Where a society is proceeded against by a name not inappropriate as a corporate designation, and the application is resisted by it in that name, and no denial of its corporate character is contained in the papers, it will be presumed that it is in fact a corporation, and that the use of the writ of *mandamus* is proper.[2]

In proceedings for reinstatement of a member, it is a question of fact, whether any, and, if any, what proceedings in expulsion took place in the society, but whether the expulsion was in accordance with the constitution and by-laws of the society, is a question of law for the court to determine.[3]

[1] Medical Society v. Weatherly, 75 Ala., 248; People v. Benevolent Society, 3 Hun. 361; State v. Georgia Medical Society, 38 Ga., 608; People v. Medical Society, 24 Barb., 570; Angell & Ames on Corp., Section 704, 705, 698; State v. Chamber of Commerce, 20 Wis., 63.

[2] People v. Benevolent Society, 3 Hun, 361.

[3] Osceola Tribe, etc., v. Rost, 15 Md., 296.

§ 50. Mandamus a discretionary writ. The issuing of a peremptory writ of *mandamus* is discretionary with the court.

By this it is not meant that the court may arbitrarily deny the writ to a person seeking restoration to membership in an incorporated society, but it is meant that a court, in the exercise of a sound discretion, may deny the writ to a person technically entitled to it, where it is apparent from the evidence in the case that the person is not entitled, in good conscience, to the protection of the court, or that reinstatement to membership would be useless to such person.

Where a member was twice notified to appear before a tribunal of the society to answer charges, and he appeared twice, and broke up the meetings, the court refused to reinstate him, where it appeared that he had been expelled at a third meeting without notice to him.[1]

The court will not order a peremptory writ to issue, restoring a relator to membership in an incorporated society, where it is plain from the testimony that the members thereof may at once expel him in the manner pointed out and agreed upon in the laws of the society.

The power of expulsion, under the rules of a society, existed only in case of a member wrongfully reporting himself sick. A member was expelled on charges of disorderly conduct, abuse of family, and calling the chairman of the committee on sickness a liar. The committee to whom the charges were referred examined witnesses to show that the relator was drunk, instead of sick, while he was drawing benefits, and their report treated this conduct as coming within the charge. The statements of the witnesses were annexed to the charges, giving point to, and explaining them, and the relator had notice and opportunity to defend. The minutes of the meeting recited that he was accused of having wrongfully drawn benefits.

Upon the trial witnesses were heard in presence of the accused, and he had opportunity to cross-examine them.

Upon these facts, the court said: "Irregularity not sufficient to deprive the relator of the full advantage of his opportunity to defend, would scarcely warrant a court, in the exercise of its discretion, to interfere by a peremptory writ,

[1]State *ex rel.* v. Portugese Society, 15 La. Ann. 73.

[2]State *ex rel.* Becker v. Society for Support of the Sick, etc., 5 Cin. Law Bull., 124.

since if the objection be simply to the irregularity of the expulsion, a restoration to membership would leave the relator liable to be expelled by a subsequent proceeding."[1]

§ 51. Delay in applying for restoration to membership. A member who has been illegally expelled from a society, should apply for reinstatement at once, if at all. Seeming acquiescence in his expulsion is of itself unfavorable to his claim for restoration; for it is reasonable to suppose that he will at once move in the direction of recovering his lost rights and privileges, if he entertains a sense of injustice and wrong when he is expelled.

Where a member for nineteen years after he was dropped from the roll of members, paid no dues, took no interest in the affairs of the society, and attended none of its meetings, the court refused to inquire into the legality of his expulsion, and dismissed his application for restoration to membership. Even arbitrary and illegal expulsion may be accepted by a member, and where he neglects to prosecute his right to restoration to membership, for an unreasonable length of time, the court may properly refuse to interfere in his behalf. The writ of *mandamus* is discretionary, and may properly be denied because of such unreasonable lapse of time.[2]

In Bachman v. N. Y. Deutcher Arbeiter Bund. 64 How. Pr. (N. Y.) 442, the fact that the member had waited for six years to apply for restoration was commented upon unfavorably, though the case was decided upon another point.

In Pulford v. Fire Department, etc. 31 Mich. 458, the delay in making application for restoration, and the non-payment of dues to the society, were accounted for by the absence of the member in the army during the war of the rebellion.

In State *ex rel.* Dindorf v. Algemeiner Deutcher Baecker Gewerbe Verein, 3 Cin. Law Bull. 295, the writ of *mandamus* was denied, and, in giving the reasons for such denial, the court says: "Another consideration in the case was that the expulsion complained of occurred in 1876, and the minutes showed that when he was expelled the relator left the society, saying it was "all right;" and it would seem, from the fact of his delaying so long (about two years) to make application for this writ, that he continued, for a considerable space of time, to think it was all right."

[1] State *ex rel.* Dindorf v. Algemeiner Deutcher Baecker Gewerbe Verein, 3 Cin. Law Bull., 295.

[2] Bostwick v. Fire Department, 49 Mich. 513; 14 N. W. Rep. 501.

§ 52. Return to writ of mandamus. The return to a *mandamus* to reinstate a member of an incorporated society must distinctly set forth all the facts relating to the expulsion, in order that the court may judge of its sufficiency, both as to the cause, and the form of the proceedings. It must show the cause of the expulsion, notice to the person expelled, such as will give him an opportunity to be heard, and such as conforms to the provisions on the subject in the contract of membership, the assembly of a proper tribunal, the proceedings before them, a conviction of the offense, and an actual expulsion by the society.[1]

These requirements are in harmony with the well settled principle, that in all cases of special and limited authority, especially when it is penal in character, and to be exercised in derogation of the common law, great strictness and jealousy is to be exercised, not only in construing the law, but in canvassing the proceedings.

Proceedings to disfranchise a member must be strictly construed, for a removal being an act of an odious nature, all clauses concerning it must receive a strict interpretation.[2]

Where the charter expressly requires that charges against a member shall be proved by two or more credible witnesses, the return must state specifically that the charges were either proved on oath by two such witnesses, or that they were confessed.[3]

And where the charter expressly requires that a charge against a member shall be made by certain officers of the society, and be signed by them, the return must show that the charge was so made and signed.[4]

The facts must be set forth distinctly and certainly, not argumentatively, inferentially, or evasively.

A return is insufficient, which states that the relator was, according to the constitution and by-laws of the society, "tried and convicted of the charges," without showing that the society took proofs which were deemed to be sufficient evidence of the truth of the charges.[5]

A return is insufficient, which states merely that the expelled

[1] Commonwealth v. German Society, 15 Pa. St. 251.

[2] Rex v. Sutton, 10 Mod. 76.

[3] Ang. & A. on Corp. Ch. 29 Sec. 8. King v. Mayor, etc. 5 Mod. 25; King v. Faversham, 8 T. R. 356. Will on Corp. pt. 2 Sec. 240, pt. 1. Sec. 702.

[4] Society v. Commonwealth, 52 Pa. St. 125.

[5] Society v. Meyer, 52 Pa. St. 125.

member was present when the charge was made, and did not deny it; it should appear that the charge was proved.[1]

§ 53. Charges preferred against a member of an incorporated society. Where the constitution of an incorporated voluntary society makes "slander against the society" by a member an offense for which he may be fined or expelled, it will be held that an offense something analagous to the common law offense of slander, as applicable to individuals, is intended; and, in a proceeding to enforce such a provision, unless the words charged to be slanderous are set forth, it cannot be known whether there is any jurisdiction to make the inquiry.[2]

If the return to the *mandamus* states in general terms that the member was expelled for violation of duty, without specifying the charges on which he was convicted, it is bad.[3]

Under articles of association providing for expelling members "guilty of improper conduct calculated to bring the society into disrepute," charges were preferred against a member; *first*, of receiving of an applicant for admission his proposed initiation fee, and failing to pay it over to the society, or to return it to the applicant,who had complained thereof to various persons; and, *second*, of having been entrusted by the secretary with the keys of the society chest, to obtain a receipt book therefrom, and of having, at the same time, and without leave, taken from such chest the original roll of the society, and refusing to return it.

It was held that the above provision covered cases of misconduct injurious to the society, and damaging to the reputation of the person charged, and that the charges were sufficient.[4]

Where the articles of incorporation authorize the expulsion of a member for being concerned in scandalous or improper proceedings, which may injure the reputation of the society, it is a good cause of expulsion, that a member, claiming relief from the society, had altered a physician's bill from four dollars to forty, and had presented that bill to the society as evidence of his claim.[5]

[1] King v. Faversham, 8 T. R. 356. People v. Benevolent Society, 65 Barb. 357.

[2] Roehler v. Mechanics' Aid Society, 22 Mich. 86.

[3] Commonwealth v. Guardians of the Poor, 6 Sar. & R. (Pa.) 469.

[4] Burton v. St. George Society, 28 Mich. 261.

[5] Commonwealth v. Philanthropic Society, 5 Binney 486.

In Fuller v. Trustees of the Academic School, etc., 6 Conn. 532, the charges were, *first;* indecorous and improper expressions respecting the board of trustees, in charging the members of the board with being governed in their official acts by a spirit of sycophancy; *secondly;* neglect of official duty, in not performing his duty as one of a committee of the board of trustees in relation to one of its concerns. The court held that though the charges, if true, subjected the accused to the censure of all honorable men, they were insufficient as causes of expulsion from the society, under its inherent power of expulsion.

The charge that a member of an incorporated society had "assisted as president of the society in defrauding the society out of the sum of fifty cents," without stating in what manner he had assisted in defrauding the society, under what circumstances of time and place, and without even stating that he had designedly assisted in the alleged fraud, is too vague and general to be sufficient.

And the charge that he had been guilty of "defaming and injuring the same in public taverns," is equally vague and indefinite.[5]

In State v. Georgia Medical Society, 38 Ga. 608, the offense charged consisted in the fact that the relator became one of the sureties on the official bond of a colored citizen of his county, who had been elected clerk of the Superior Court of the county, by a majority of the legal votes cast at the election for that office, and in the further fact that he became surety on the bonds of certain other colored citizens who were charged with the offense of riot, for their appearance at court to answer the charge as the law directs. The charge was "ungentlemanly conduct," contrary to the by-laws passed under authority of the charter. The court held the offense, as charged, insufficient and said: "He was expelled for doing that which the law of this State not only authorizes, but encourages. The very fact that the law requires the clerk of the Superior court to give bond and security for the faithful discharge of his duties, is sufficient to justify any citizen of the county in becoming one of his sureties, and protect him, in contemplation of law, from the imputation of having forfeited his position as a gentleman by so doing."

[5] Commonwealth v. German Society, 15 Pa. St. 251.

§ 54. **Same subject continued.** Where the rules of an incorporated society forbid a member to commence a suit at law against another member "except the case be of such a nature as to require and justify a process at law," it is not sufficient, in a return to a *mandamus*, to merely state the rule, and aver that the expelled member had commenced a suit at law. It should also be averred that "the case was not of such a nature," etc.[1]

The charter declared the objects of the association to be, among other things, "to adjust controversies between its members, and to establish just and equitable principles in the cotton trade," and gave it power to make all proper and needful by-laws, not contrary to the constitution and laws of the State of New York, or of the United States, and "to admit new members, and expel any member in such manner as may be provided by the by-laws." The by-laws provided for expulsion for improper conduct, but did not state what should be considered as such.

There was no express or implied authority conferred upon the association by its charter or by-laws, to try the title to a seat in the exchange, and to determine who was the owner of a right of membership in dispute.

A member asserted his ownership of a right to a seat which had formerly belonged to an expelled member, and the association claimed that the right of membership had been forfeited, and was subject to sale by it. A committee charged with the investigation of this controversy decided adversely to the member's claim of ownership. He then commenced an action against the association, and obtained an injunction restraining it from selling the right of membership. For this act he was arraigned and expelled.

The court held that he was not guilty of improper conduct warranting his expulsion for resorting to the courts to prevent the association from disposing of such a right of membership; that he was not acting in antagonism to the corporate power of "adjusting controversies between its members" or of "establishing just and equitable principles in the cotton trade," but was asserting a right secured to him by the fundamental law of the land.[2]

Where the rules of a board of broker's provided that if any member should refuse to comply with his stock contracts, he

[1] Green v. Society, 1 Sar. & R. (Pa.) 254.

[2] People *ex rel.* v. N. Y. Cotton Exchange, 8 Hun N. Y. 216.

should be expelled, it was held not to be a sufficient charge that a member had refused to comply with a contract for the sale of oil lands.[1]

It is not a proper cause for expulsion that prior to the admission of a person to membership in a society, he conducted himself in such a manner, and performed such acts, as would justify the expulsion of a member for breach of his corporate duty. Persons who are not members of a society are not bound to observe its laws, and cannot be said to break its laws by any of their acts.

Where a physician, before he became a member of a medical society, advertised his ability to effect cures in certain diseases, etc., it was held that, as he was not amenable to the laws of the society at the time he procured these advertisements to be published, the society had no jurisdiction to try him for the offense.[2]

A member of a fire department failed to pay his dues to the corporation for a long period of time, and the society passed a by-law providing that anyone who had been in arrears for dues, for a certain length of time, should be expelled. The member was at once expelled, but the court held the charge insufficient, and the by-law void, as being in the nature of an *ex post facto* law.[3]

[1] Leech v. Harris., 2 Brewster (Pa.) 571.

[2] People v. Medical Society, 32 N. Y. 188; *In re* Newell Smith, 10 Wend. 447.

[3] Pulford v. Fire Departmentt, 31 Mich. 458.

Membership.—Part III.

UNINCORPORATED SOCIETIES.

SEC. 55. } Inherent power of unincorporated society to expel members.
SEC. 56. }
SEC. 57. Right of unincorporated societies to pass by-laws providing for the expulsion of members. Effect of such by-laws on protesting minority, etc.
SEC. 58. Power of expulsion by long and immemorial usage.
SEC. 59. } Expulsion of members agreed upon in contract of association.
SEC. 60. }
SEC. 61. } Reinstatement to membership in unincorporated society.
SEC. 62. }
SEC. 63. Proper remedy of expelled member.
SEC. 64. Charges against a member of an unincorporated society.

§ 55. Inherent power of unincorporated society to expel members. In the absence of any provision in the constitution or by-laws of an unincorporated society, giving to the members the power of expulsion, there is no inherent power in the majority to expel a member.

The society, as such, has no legal entity, and it would be manifestly absurd to say that it had the power of self-preservation. The written contract of association expresses the terms on which the members meet together, and is the law governing the members in their relations toward each other. There is the greatest possible latitude given to the members to agree upon the terms upon which they shall associate, but the law will supply no provisions in the articles of association. In the absence of an agreement that it may be done, the majority may not expel the minority of an unincorporated society.[1]

It is sometimes said that this is the English rule, but that, in this country, the inherent power of such societies to expel their members is recognized, and may be exercised for the same causes as in incorporated societies. The case of Leech v. Harris, 2 Brewster (Pa.) 571, is cited as the authority for the so called American doctrine.

In the first place, the opinion expressed in that case, about

[1] Dawkins v. Antrobus, L. R. 17 Chan. Div. 615.

which the court had "very little doubt," is a mere *dictum*, and then, the ground upon which the court predicated the opinion was that unincorporated societies were given a legal existence, and were placed under the supervision of the courts by the laws of Pennsylvania. And in White v. Brownell, 4 Abb. Pr. N. S. 162; 2 Daly 329, it is said, that "where they (unincorporated societies) have no regulation upon the subject they may expel a member by a vote of the majority, if he has been notified of the charge against him and afforded an opportunity of being heard in his defense, citing Innes v. Wylie, 1 Car. & Kir. 262."

The range of discussion is wide in the case of White v. Brownell, and the opinion is, in many respects, exceedingly valuable. The language quoted is, however, entirely outside of any questions in the record. The case of Innes v. Wylie is an English case which holds that a member may not be expelled from a society without notice, and that damages for deprivation of rights of membership can only be recovered in certain cases. The court begins its opinion by saying: "I am of opinion that where there is not any property in which all the members of a society have a joint interest, the majority may by resolution remove any one member." The majority *can* remove a member in such a case, and he will be without remedy, because the courts will not exercise jurisdiction to reinstate a member, merely that he may enjoy the right to meet with other members, but the majority *may* not remove him, for it is fundamental, as will hereafter more fully appear, that the majority must proceed according to the rules of the society. Having no rules, how may they proceed in the matter?

§ **56. Same subject continued.** In Otto v. Journeyman Tailors' Protective and Benevolent Union, Cal.; 17 Pac. Rep. 217, the charge upon which the member was expelled from an unincorporated society was that he had been guilty of a conspiracy to injure and destroy the society. The constitution provided as follows: "If any member defraud this union, he shall be dealt with as the central body may decide." Beyond this no specific provision appeared in the constitution or by-laws, under which members might be expelled. The contention of the society was that the power of expulsion is inherent in every society, and that the offense of which the member was found guilty was sufficient ground for expulsion, as matter of law, irrespective of any provision of the constitution or by-laws. The member was reinstated to membership

upon the ground that the facts in the case raised the inevitable conclusion that the trial and conviction of plaintiff was a travesty upon justice, and lacking in the essential elements of fairness, good faith, and candor, which should characterize the action of men, in passing upon the rights of their fellow-men.

But in the opinion the court subscribes to the proposition that there is an inherent right of expulsion in *every society*, and says:

"The right of expulsion from associations of this character may be based and upheld upon two grounds:

First, a violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation.

Second, for such conduct as clearly violates the fundamental objects of the association, and, if persisted in and allowed, would thwart those objects, or bring the association into disrepute. We content ourselves with stating the propositions thus broadly, and, for the purposes of this case, need not refer to the numerous authorities defining and limiting the power."

It is evident from this language that the expulsion would have been sustained by the court, had it not found that malice and bad faith were the motives which prompted it. While this case is not an authority in favor of the proposition that unincorporated societies have an inherent power of expulsion, it indicates very decisively the opinion of the court upon the question.

Where the contract of association is silent as to the expulsion of its members, and a minority—whether one, or more—defrauds the members, or performs acts against the objects and purposes for which the members associated, the remedy is by dissolution, and distribution of the property among the members.

It is within the power of the members to provide the remedy of expulsion, and thus to preserve the association from dissolution in such cases, but the law will not interpolate into the contract of the associates a provision supplying such a remedy.

The true rule is laid down in White v. Brownell, 3 Abb. Pr. N. S., 318, where it is said: "As this association is not organized in pursuance of any statute, nor are the terms of membership fixed by principles of the common law, it follows that the agreement which the members make among themselves on the subject, must establish and determine the rights of the parties on the subject. The constitution of the association and its laws agreed upon by the members, contain all the

stipulations of the parties and form the law which should govern. The members have established a law themselves."

§ 57. **Right of unincorporated societies to pass by-laws providing for expulsion of members.—Effect of such by-laws on protesting minority, etc.** When a person becomes a member of an unincorporated society, he is bound by the laws of the society as they exist at the time of his admission. If, by the contract of association, the majority has power to make and alter rules affecting the general interests of the society, he is bound by such by-laws as may thereafter be passed concerning expulsion of members. But if the contract of association is silent as to future legislation by the members, he is not bound by subsequent by-laws, unless he voted for them, assented to them, or in some way acted upon them. There is no inherent right in an unincorporated society to pass by-laws for the expulsion of members.

In Dawkins v. Antrobus, L. R. 17 Chan. Div. 615, the question was as to whether a by-law, under which a member had been expelled, was binding upon him as a member of a certain club. The court said: "Now that does not depend on the inherent power of a club to pass a rule to expel one or more of its members; I, for one, am unaware of the existence of such a power, and I was surprised to hear such a proposition put forward. There is no more inherent power in the members of a club to alter their rules so as to expel one of its members against the wishes of the minority, than there is in the members of any society or partnership which is founded on a contract, that written contract, of course, expressing the terms on which the members associate together; and it is intolerable to imagine that the majority should in such a case claim an inherent power of expelling the minority. I say this because that has been a matter pressed upon me as if capable of argument. I think it is not."

Where the articles of association are silent upon the power of future legislation, a protesting minority are not bound by the acts of a majority in passing by-laws.

§ 58. **Power of expulsion by long and immemorial usage.** It is undoubtedly true that some unincorporated societies which have existed for many years, either as a certain and definite class, or as individual societies, have the right to inquire into the conduct of their members, and the power to expel them for certain offenses, whether this right

and power is specially conferred by the contract of membership, or not.

Churches, for instance, may expel their members for immoral and scandalous conduct. This power is established by long and immemorial usage; and when the usage has been proved, the law will presume the existence of provisions in every contract of membership in a church, giving to it this power of expulsion, and will also presume that the member joined the church well knowing, and assenting to, the recognized power of expulsion in the body of the church.

It must be remembered that the contract of membership in a church is not a written contract; it arises from admission into fellowship with a large and indefinite body governed by certain customs and usages; it is, at most, a contract partly in writing and partly constituted of these customs and usages. It differs from a contract of membership wherein all the conditions of membership are specifically set forth.

But even in a church, this power of expulsion is not to be regarded as an inherent power, but must be said to be a power arising from usage and custom which implies the existence of an unwritten by-law conferring the power upon the church. And an inherent power is vastly different from one which is conferred by a custom. It requires no evidence to establish the existence of an inherent power, but a custom must be proved as any other fact.

It would be exceedingly difficult to prove a custom that would sustain the expulsion of a member from a society in which the contract of membership is specifically written out. Custom may not be shown to take the place of the contract of membership as agreed upon, but may be shown merely as evidence of the adoption of an additional unwritten provision.

Where this contract, originally silent as to the power of expulsion, has been amended from time to time during the period over which it is proposed to show that the custom of expelling members has extended, but where no amendment is added upon the subject of the power of expulsion, no custom can prevail over the express provisions of the contract as amended.

And, again, it may be questioned whether an established usage can be successfully asserted in any society which is only in its infancy—which has only existed for five or ten years. A usage, in its most extensive meaning, includes both custom and prescription; but, in its narrower signification, it refers to a general habit, a mode or course of procedure. A usage differs from a custom, in that it is not required that it should

be immemorial to establish it; but it must be known, certain, uniform, reasonable, and not contrary to law.

It will, therefore, be next to impossible to show that, under a contract of association which has been only a few years in existence, there can have grown up a usage in regard to the expulsion of members, although no express power of expulsion is given by the terms of such contract.

To make a proper showing of such usage, it is necessary to show cases sufficiently numerous to establish a course of procedure, in which the power has been exercised and acquiesced in by the society. To be able to cite a few instances in which such a power has been exercised will not establish a usage. This doctrine is, by analogy, clear and well settled. [1]

§ 59. Expulsion of members agreed upon in contract of association. An unincorporated society may, in its articles of association, prescribe the conditions upon which the continuance of membership shall depend. There is one, and only one, qualification to this rule: such society may not make the continuance of membership dependent upon a condition which is contrary to the laws of the land.

In such a society, the privilege of membership is not given by statute, as in a corporation, but is created and conferred by the organization itself, and is derived exclusively from the body that bestows it.

When a person becomes a member he bases his rights, as such, not upon any charter which guarantees to him a certain protection under the laws of the land, but upon the will of a majority of his fellow members, under the contract of association. The policy and acts of such a society are necessarily controlled by a majority of its members; and the constitution and by-laws agreed upon, contain the contract of association, and form the laws which govern the majority, and each member of the society.

It is not the province of a court to make contracts for parties, and it may not make any other contract for the members than that which is set forth in the constitution and by-laws.

The court has no visitorial power over unincorporated societies, since they exist, not by grant from the state, but by agreement of the members; and when the parties have agreed upon the terms under which membership shall continue, the

[1] Knights of Pythias' case, 3 Brewster 452.

court will not inquire into the reasonableness or unreasonableness of such terms.

There are *obiter dicta* in some cases, and one decision, to the effect that courts will not inquire into the reasonableness of by-laws of voluntary societies, even though they be incorporated, if it be shown that the member assented to them.

There are numerous *obiter dicta* in the books to the effect that courts will not interfere with the rules and by-laws of unincorporated voluntary societies, *unless they are manifestly harsh and unconscionable;* but it is believed that there is not a case in which a court has ever declared a by-law of such a society to be unreasonable and, on that account, invalid.

The true rule is, that the by-laws of an incorporated society must be reasonable and necessary for their good government, as well as in conformity with the laws of the land, and the assent of the members to the by-laws is not to be considered;—but individuals who form themselves into an unincorporated voluntary society for a common object, may and do agree, that, so long as they retain their relations with the society, they shall be governed by the constitution and by-laws as they exist, and as they may be amended under the contract of association, if there is nothing in them in conflict with the law of the land; and those who become members of the society are presumed to know them, to have assented to them, and are bound by them.

While a society remains unincorporated, therefore, it may make regulations *ad libitum* for the discipline of its members, including, of course, expulsion, so long as they are not in conflict with the law. But the moment it obtains a charter, it parts with the powers it before possessed, and comes under the law which governs corporate bodies.[1]

While this power to determine the causes for which a member may be expelled is very extensive, and may be said to be almost beyond the control of the law, yet it is held in check and from abuse by the powerful motive of self-interest.

The abuse of the power may be visited upon those who are responsible for such abuse; and hence the compact of association will naturally be formed in a spirit of justice and fairness to the interests of all the members.

§ 60. **Same subject continued.** Where the rules of an unincorporated society provide that if the society "shall at any time deem the conduct of any member suspicious, or that

[1] State v. Medical Society, 38 Ga. 608.

such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member," etc.,—the language of these rules gives an unconditional and absolute power to the society to expel a member.[1]

The rules of a club provided that "it shall be the duty of the committee, in case any circumstances should occur likely to endanger the welfare and good order of the club, to call a meeting, and in event of its being voted at that meeting by two-thirds of the persons present, to be decided by ballot, that the name of any member shall be removed from the club, then he shall cease to belong to the club."

The court, in commenting upon the power of this club to expel its members, says: "It is clear that every member has contracted to abide by that rule which gives an absolute discretion to two-thirds of the members present to expel any member. Such discretion, like that referred to by Lord Eldon, in While v. Damon, 7 Ves. 35, must not be a capricious or arbitrary discretion. But if the decision has been arrived at *bona fide*, without any caprice or improper motive, then it is a judicial opinion from which there is no appeal. None but the members of the club can know the little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would induce this court to interfere."[2]

Where the only penalty imposed by the constitution and by-laws of an unincorporated society for an offense, is a fine, the expulsion of a member for such an offense is invalid.[3]

§ 61. Reinstatement to membership in unincorporated society. Unincorporated voluntary societies will be held to the fair and honest administration of the rules which are in force when any proceeding is instituted against a member; but where the rule which the member is found to have violated, is not contrary to the law of the land, and a member is expelled in conformity with the rules, after proper notice, and the proceedings are regular, and in good faith, no judicial tribunal may interfere with the expulsion.

In Dawkins v. Antrobus, 44 Law Times Report, (N. S.) 557, it is laid down as a rule, that courts will consider the expul-

[1] Wood v. Woad *et al.* L. R. 9 Exch. 190.

[2] See Inderwick v. Snell, 2 Mac. & G. 216; Manby v. Gresham Life Assurance Society, 29 Beav. 439; Lambert v. Addison, 46 L. T. R. 20; Lyttelton v. Blackburn, 33 L. T. R. N. S. 642.

[3] Otto v. Journeyman's etc. Union Cal: 17 Pac. Rep. 217.

sion of a member from an unincorporated society, only to determine three things; first, whether the decision arrived at is contrary to natural justice, as, for instance, whether he had an opportunity to be heard in explanation of his conduct; secondly, whether the rules of the society have been observed; thirdly, whether the action of the society was malicious and not *bona fide*. Courts will not undertake to act as courts of appeal from the decisions of tribunals of unincorporated societies, but will only determine whether such tribunals have acted *ultra vires*. The court has no right to consider whether what was done was right or not, or even, as a substantive question, whether what was done was reasonable or unreasonable. It may inquire into the reasonableness of the action of the society, and from the want of reasonableness,—from the fact that the action is beyond reason, it may find evidence tending to show bad faith in such action. But mere proof that the action is contrary to reason is no cause or sufficient ground why the court should interfere. Such proof is not a necessary conclusion that there has been want of good faith, for, even after having come to the conclusion that a decision was wholly unreasonable, one might be convinced *aliunde* that, nevertheless, there was no malice,—that what was done was done in good faith. It is not for the court to decide whether or not it would have arrived at the same conclusion with the society. It will examine into the proceedings and decision of the members, and consider whether or not they are erroneous, only for the purpose of determining whether they are so absurd, or evidently wrong, as to afford evidence that their action was not *bona fide*, but was malicious, or capricious, or proceeded from some other motive than a desire to exercise fairly and honestly the power given by the rules of the society. The agreement of the associate is, not that he will submit to expulsion if the courts shall say he ought to be expelled, but that the members of the society, acting in good faith, and according to the rules, may expel him, even though they make an honest mistake in exercising that power.

§ **62. Same subject continued**. The rights of a person who has been expelled from an unincorporated society are to be determined by the constitution, by-laws and rules of the society.

The provisions of such constitution, by-laws and rules, must be strictly followed in all proceedings for the expulsion of a member; and a result reached through their violation cannot

be upheld. No member of a society, whether incorporated or unincorporated, should lose his right of membership upon a doubtful construction of the by-laws, rules and regulations of the society. Such by-laws, rules and regulations must be construed liberally, with a view to the maintenance and continuance of the rights of membership; and, in case of conflicting provisions setting forth the member's rights and duties, or the proceedings that may be taken to deprive him of his rights, that provision will prevail which is most favorable to the continuance of his membership.

Membership in an incorporated society is a species of property, and, as has been said on a preceding page of this work, the court will interfere to protect that right of membership, even though the society has no property. But the law does not regard membership in an unincorporated society as a valuable right and privilege, and a court will not inquire into the proceedings in expulsion from such a society merely to restore a member to the privilege of meeting the other members of the society.[1]

As a general rule, therefore, in order to give the court jurisdiction to inquire into such proceedings in expulsion, some allegation and proof must be made showing an injury to the right of enjoyment of the property of the society. He cannot, probably, show any severable proprietary interest in the property of the society, but he may show, as has been suggested, a right to the use and enjoyment of it, and a right to a proportionate share of it in case of a dissolution of the association.

Where the expulsion has been effected contrary to the general principles of the law, as, for instance, without notice or opportunity to be heard, or for not complying with an illegal by-law of the society, the court will not require a strong showing of pecuniary loss, but will take jurisdiction even where remote, indirect or small pecuniary loss has resulted, or may result to the member.[2]

The rules of a club provided that, in case the conduct of any member, either in or out of the club-house, should, in the opinion of the committee, or of any twenty members of the club who should certify the same in writing, be injurious to the character and interests of the club, the committee should

[1] White v. Brownell, 4 Abb. Pr. (N. S.), (N. Y.), 162.

[2] Innes v. Wylie *et al.*, 1 Car. and Kir. Rep. 257; Fisher v. Keane, L. R., 11 Chan. Div., 353; Metropolitan Base Ball Club v. Simmons, 17, Weekly Notes of Cases, 153.

be empowered (if they deemed it expedient) to recommend such member to resign, and, if the member so recommended should not comply within a month from the date of such communication being addressed to him, the committee should then call a general meeting, and, if a majority of two-thirds of that meeting agreed by ballot to the expulsion of such member, his name should be erased from the list, and he should forfeit all right or claim upon the property of the club. A member of the club sent a pamphlet which reflected on the conduct of another member, S., at his official address, such pamphlet being enclosed in a cover on which was printed: "Dishonorable conduct of S." This was brought to the attention of the committee, and they called upon the member to resign, being of opinion that his conduct was injurious to the character and interest of the club. He, however, refused to resign, and a general meeting was called, at which the requisite majority voted in favor of his expulsion. On an action by the member to restrain the committee from excluding him from the club it was held that the plaintiff having had an opportunity of explanation, the rules having been observed, and the action of the club having been exercised *bona fide*, and without malice, the member was entitled to no relief from the court.[1]

§ 63. Proper remedy of expelled member. A proceeding may be maintained against the members of an unincorporated society, or against a number of them representing the others, when they are too numerous to be joined, by an expelled member thereof, to compel his restoration of membership. The object of such a proceeding is to place him in a position where he can reach the joint property and rights of the association. The propriety of the expulsion may be reviewed in such a suit.[2]

Mandamus is not a proper remedy against an unincorporated society for the restoration of an expelled member.[3]

It is held in several cases that the proper remedy of a member who is about to be illegally expelled from an unincorporated society, is by bill in equity seeking to restrain the tribunal from further proceedings in the matter; and that the proper remedy of a member who has been illegally expelled from such a society, is by a bill in equity to restrain the offi-

[1] Dawkins v. Antrobus, 44 L. T. R. (N. S.) 557; L. R. 17 Chan. Div. 615.

[2] Fritz v. Muck, 62 How. Pr. 70; Olery v. Brown, 51 How. Pr. 92.

[3] People v. German, etc. Church, 53 N. Y. 103.

cers and members from interfering with his rights of membership.[1]

In Loubat v. LeRoy, 40 Hun 546, the action was to have decreed as unlawful, null and void, a resolution of expulsion passed by the society, and to restrain the officers and members of the society from interfering with the enjoyment by plaintiff of his rights and privileges as a member; and such relief was granted.[2]

§ 64. Charges against a member of an unincorporated society. Whether the moral conduct, or acts complained of as prejudicial to the society, are sufficient to justify expulsion, under the general power of expulsion agreed upon in the constitution of the society, is a matter exclusively for the tribunal hearing the complaint, and not for the court to decide.

Such decisions may not be reviewed by a court, nor even be considered, unless the alleged cause of expulsion be so trivial, or unimportant of itself, as to suggest that the action of the tribunal was capricious, or corrupt, and not *bona fide.*

Whether a certain act or omission is an offense against the laws of the society, is a question which the society alone must determine. The society must enact and construe its own laws, and enforce its own discipline, without the interference of courts.[3]

The sufficiency of the charges, when made, in respect to the specification of time, place and circumstance, will not be inquired into by the courts, but must be determined by the society, or the court of the society, before which the cause is to be tried. But if courts had the power to determine the sufficiency of the charges in such respects, they would not test the correctness of the charges by the strict rules of criminal pleading, but would hold that, if they are so plainly drawn that the nature of the offense may be understood, they will be sufficient.

A society is bound by the exact letter of its rules, and must

[1] Kerr v. Trego, 11 Wright 292; Fisher v. Keane L. R. 11 Ch. Div. 353; Metropolitan Base Ball Club v. Simmons, 17 Weekly Notes of Cases 153; Labouchere v. Earl of Wharncliff, L. R. 13 Ch. Div. 347; Kerr on Injunctions, Star pages 545–6–7; Hassler v. Phil. Musical Association, 37 Leg. Int. 434; Leech v. Harris, 2 Brewster 571; *In re* St. Clement's Church, 28 Leg. Int. 172. But see Sec. 85-86.

[2] See Rorke v. Russell, 2 Lans. (N.Y. Sup. Ct.) 244.

[3] Dawkins v. Antrobus, 44 Law Times Report (N. S.) 557; Chase v. Cheney, 58 Ill. 509; Wood v. Woad *et al* L. R. 9 Exch. 190.

follow them strictly, when seeking to expel a member for a supposed violation of them.

A member was expelled from a society. The club from which he was expelled was a workingmen's club, and the member was also a member of a licensed victuallers' trade protective association. The circumstances under which the plaintiff was expelled by the club committee were as follows: The committee of the club, who had no license for the sale of spirituous liquors, were accustomed to sell spirits and beer in bottles to members, to be either consumed on the premises or taken away. The plaintiff, to test the legality of this course, and by the instructions of his trade protective association, bought a bottle of whiskey and another of beer at the club and took them away with him. He then sent a messenger with his member's ticket, to buy a bottle of beer, but he was not served, on its being discovered that the messenger was not a member. The trade protection association took out a summons in the police court against the committee for an infringement upon the licensing laws; evidence was given by the plaintiff in support of the charge, and the committee was held guilty and fined.

The plaintiff was then informed that his conduct would be considered by the committee, and they afterward informed him that he had been expelled for breach of the club rules. The only rule which was cited on the hearing of the motion, as having been infringed, was a rule providing that no visitor could pay for any article, and the contention of the club was, that the attempt of the plaintiff to purchase through the messenger was a breach of the rule with respect to visitors. The motion on behalf of the plaintiff was for an injunction to restrain the committee from interfering with his enjoyment of the club property, and the application was granted on the ground that no breach of the rules had been committed.[1]

Where, under the powers of the constitution, a member has been expelled by the ministers and elders of a church, for entertaining opinions, and promulgating doctrines within the society, at variance with the established belief and subversive of the society, the court will not, in an action of tort for such expulsion, determine whether, or not, the opinions and doctrines of the expelled member were, in fact, inconsistent with the established belief of the society.[2]

[1] 72 Law Times, 183.

[2] Grosvenor v. United Society, 118 Mass. 78; Waite v. Merrill, 4 Me. 102; Farnsworth v. Storrs, 5. Cush. 412.

Where it was alleged that the offense was committed "at divers times during the two years last past" and "at divers times during the six months last past," the charges were held sufficient in regard to the time laid, as the allegation of the precise time was not essential.[1]

[1] Chase v. Cheney, 58 Ill. 509.

Membership.—Part IV.

SEC. 65. Notice of 'charges against member; opportunity to be heard.
SEC. 66. Exceptions to the rule that notice must be given.
SEC. 67. Service and proof of notice.
SEC. 68. Waiver of notice
SEC. 69. Answering charges at same meeting at which they are presented.
SEC. 70. } SEC. 71. } Sufficiency of notice, waiver of sufficiency, etc.
SEC. 72. Tribunal of the society expelling a member.
SEC. 73. Right to trial by jury does not apply to proceedings in expulsion.
SEC. 74. } SEC. 76. } Regularity of proceedings in expulsion.
SEC. 77. Statute of limitations does not apply to proceedings in expulsion.
SEC. 78. Good faith in proceedings in expulsion.

§ 65. Notice of charges — opportunity to be heard. It may be stated, as the general rule, that a society, the members of which become entitled to privileges or rights of property therein, may not exercise its power of expulsion without notice to the member, or without giving him an opportunity to be heard. It is a fundamental principle of law, recognized in every court of justice, that no man shall be condemned or prejudiced in his rights, without an opportunity to be heard. A society, or select number of its members, to whom authority is given in the premises, is a court when passing on the rights of its members. *Audi alteram partem*, is the first principle in the administration of justice, and it is against natural justice to proceed against one's rights without giving him an opportunity to be heard in defense of them.[1]

It is competent for the members of a society organized for the purpose of mutual insurance, to agree that the non-payment of an assessment levied by it, within a stipulated period of time after notice of the assessment, shall *ipso facto*, operate as an expulsion of a delinquent member from the society. Such an expulsion is in reality a forfeiture of rights for a cause over which the member has full control, and for a cause which imputes to the member no disgraceful conduct.[2]

[1] People v. Benevolent Society, 3 Hun 361; Delacy v. Neuse River Nav. Co. 1 Hawks (11 N. C.) 274; Fritz v. Muck, 62 How. Pr. (N. Y.) 69; Loubat v. LeRoy, 40 Hun (N. Y.) 542.

[2] See assessments—forfeiture for non-payment.

But it is a well established rule of law that no man shall be condemned to suffer the consequences resulting from alleged misconduct, until he has been notified of the accusation, and been given an opportunity of making his defense. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal, or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

A by-law providing that a member may be expelled for any alleged misconduct, without notice to him, and without affording him an opportunity to be heard, is in conflict with the law of the land, and is void.[1]

§ 66. **Exceptions to the rule that notice must be given.** But where a member was twice cited to appear and stand his trial before a tribunal of the society, and appeared each time, and, by ruffianism and violence, broke up the meeting and prevented a sentence, the court refused to exercise its equitable powers to restore him to membership, where it appeared that at a third meeting he was expelled without notice to him.[2]

Where a member of the society has been tried in a court of the land, found and adjudged guilty of an infamous crime, and the judgment of the court has been sustained in the highest court of appeals in the state, it is apprehended that an expulsion from the society, without notice, or preferment of specific charges, would be valid and binding. In such a case it is to be presumed that the member had a fair and impartial trial in court, and the judgment of the court being conclusive against the member as to his guilt, may well be accepted by the society as a sufficient determination of his unfitness for continued membership. A resolution at a proper meeting, declaring his rights of membership forfeited because of his conviction in court of the crime, would doubtless be a valid expulsion.

Under a provision of the constitution of the grand or supreme body of a mutual benefit society, guaranteeing a fair hearing to every member before expulsion, except when such member has been expelled from a subordinate lodge of the society, of which he was a member, it is competent for the

[1] Wood v. Woad *et al* L. R. 9 Exch. 190; Fritz v. Muck, 62 How. Pr. (N. Y.) 69; Wachtel v. Society, 84 N.Y. 28; Compare dictum in People v. Society, 24 How. Pr. on p. 221.

[2] State v. Portugese Society, 15 La. Ann. 73.

grand or supreme body to expel, without notice, a member who has been expelled by the subordinate lodge.[1]

§ 67. Service and proof of notice. Although the rules of the society do not provide that notice shall be given to a member, of the charges against him, and the meeting at which he will be tried, the member to be expelled should have such notice, and be given an opportunity to be heard in his defense.[2]

A by-law of a religious society provided as follows: "Any member who shall either cease to regularly worship with the society, or who shall fail to contribute to the support of its public worship, for the term of one year, shall have his or her name dropped from the list of members."

It was held that a member could be deprived of his membership only by a vote of the society, after notice, and opportunity to be heard.[3]

In the absence of any agreement by the member, or any provision in the charter or by-laws, for a different mode of service, it should be made personally, as required at common law, where the object is to deprive a party of his rights, or property; or, if that can be dispensed with, then in such other mode as will be most likely to effect its object.[4]

Where a party is entitled to notice, and has not stipulated to have it transmitted by mail or otherwise, he is not bound by any notice until it has actually been received.[5]

Unless some special mode or form of notice be required by the charter, or by-laws, personal service will be sufficient.[6]

Notice of charges against a member is not sufficiently proved by the testimony of a witness, that he served on the accused member a written notice to appear at a particular time, where he also testifies that he cannot say what the notice was, as he handed it to the accused without reading it to him, and it was written by an officer of the society, who is not examined.[7]

[1] Pfeiffer v. Mt. Horeb Encampment, etc., 13 Daly 161.

[2] Fritz v. Muck, 62 How Pr. 69.

[3] Gray v. Christian Society, 137 Mass. 329; See Commonwealth v. Pennsylvania Beneficial Institution 2 Sar. & R. (Pa.) 141.

[4] Wachtel v. Noah Widows' and Orphans' Society, 84 N. Y. 28.

[5] Durhans v. Corey, 17 Mich. 282; Castner v. Farmer's Mutual etc., 50 Mich. 273.

[6] Jones v. Sisson, 6 Gray 288; York Co. Mut. etc. v. Knight, 48 Me. 75; Williams v. German Mutual etc. 68 Ill. 387.

[7] Downing v. St. Columba's Society, 10 Daly 262; Proof of service or giving of notice, involves proof of its contents; Supreme Lodge v. Johnson, 78 Ind. 110

The by-laws of a mutual benefit society provided that each applicant for membership should be a member in good standing of a lodge of Odd Fellows, and that, if he were dropped or expelled from his lodge, his membership should cease, and the society should not be bound to his beneficiary. The by-laws of the Odd Fellows lodge to which a member of such mutual benefit society belonged, provided that notice should be issued by the secretary to members in arrears for dues, and that if the dues were not paid within four weeks from the date of notice, the delinquent should be dropped. It was held that it was not sufficient to cause the forfeiture of his rights in the mutual benefit society that the books of his lodge contained an entry that he had been dropped, in the absence of the evidence that he had received the required notice.[1]

Where a firm is a member of a chamber of commerce, and each member of the firm has the rights of members of the chamber, notice of the charges of unmercantile conduct against any member of the firm, may be properly given to the firm itself.[2]

A return to a *mandamus* to restore an expelled member, which states that the expelled member was heard in his defense, is sufficient, without stating that he was summoned to appear.[3]

§ **68. Waiver of notice.** In Commonwealth v. Pennsylvania Beneficial Institution, 2 Sar. & R. (Pa.) 141, it is said, that if the accused member is present when the subject of his expulsion is taken up, and is willing to enter into the inquiry immediately, there is no occasion for further notice.

Willcox on Municipal Corporations at page 265 lays it down, as the rule, that when the accused has appeared at the meeting, and either defends himself, or answers or confesses the charge against him, he thereby waives his right to notice.

In Downing v. St. Columba's etc. Society, 10 Daly (N. Y.) 262, it is said: "It has been decided that though a member attends, and enters upon his defense, he does not waive his right to a notice of the charges." The reason suggested for such a rule is, that if a member be not apprised of the charges, he will have no opportunity to bring witnesses in his behalf. It is undoubtedly true, that, if a member appears at a meeting

[1] Odd Fellows etc. Association v. Hook, 10 Cin. Law Bulletin 391.

[2] Blumenthal v. Chamber of Commerce, 7 Cin. Law Bull. 327.

[3] King v. Mayor etc. of Wilton, 5 Modern Repts. 257; 2 Salkeld's Repts. 428.

where charges against him are taken up for hearing, and declares that he has had no notice of the charges, and that he is unwilling to proceed with the investigation, he does not waive his right to a notice of the charges by entering upon his defense. By his protest, he saves his right to question the jurisdiction of the society over his person. But if he, without qualification, submits himself to the jurisdiction of the society, he undoubtedly waives his right to notice.

The authorities cited by the court in Downing v. St. Columba's Society, *supra.* do not sustain the proposition therein laid down. They are to this effect: Where the contract of membership provides that, when charges are preferred against a member, notice of the meeting at which they shall be considered, shall be given in a certain manner to the members of the society, the fact that the accused member attends a meeting of which proper notice has not been given, and enters upon his defense before the society, does not preclude him from afterward filing a bill impeaching the proceedings at that meeting as irregular and invalid for want of proper notice.[1] As the society, in proceedings of expulsion, acts as a court of limited and special jurisdiction, it is necessary, in order that it may obtain jurisdiction of the subject matter, that all the steps required, under the contract of membership, be taken. By an appearance at the investigation, the accused member neither confers jurisdiction of the subject matter upon the society nor admits such jurisdiction to be in it. The society must, by its own acts, in accordance with the contract of membership, acquire jurisdiction of the subject matter. The society may acquire jurisdiction of his person by serving the required notice upon him, or it may acquire it by the consent and act of the accused member, in submitting himself to its jurisdiction.

§ 69. Answering charges at same meeting at which they are presented. Sergeant Whitaker's case, 2 Ld. Raymond 1240; 2 Salkeld's Repts. 435, is sometimes quoted as authority for the statement that it is very doubtful whether a member waives his right to notice by appearing to, and answering charges at the same meeting at which the charges are presented.

But Kyd on Corporations, on page 447, says of that case; " It is not easy to reconcile the event of the case with what is reported to have been said by the Chief Justice and the court,

[1] See § 70.

'that the sergeant appearing, and being charged and answering, supplied the want of notice, both of the time and of the offense,' and 'that he might waive the notice if he would.' The ground on which the peremptory *mandamus* was awarded was that one offense was specified in the notice, and that he was charged with another when he appeared; how is this to be reconciled with the proposition 'that appearing and answering supplied the want of notice of the offense'? That a man may waive anything which the law has intended for his benefit, is a general proposition which cannot be denied; and as previous notice of an offense charged against a party, is given him only that he may come prepared to defend himself, he may, no doubt, dispense with it.

But if he be present accidentally at a meeting, and answer immediately, or be unable to give an answer, to a charge made against him, of which he had no previous notice, is it from thence to be concluded that he *waives* the necessity of such notice? I apprehend that nothing less would cure the want of notice, than an express declaration of the party, that he consented to answer without it." [1]

§ 70. Sufficiency of notice, waiver of sufficiency, etc. In giving notice of charges against a member and of a meeting called to consider his expulsion, the rules of the society must be strictly followed.

One of the by-laws of a society provided, amongst other things, that special meetings of the society might be convened as the president should deem necessary, or upon the requisition of any three members of the society, the notices of which special meetings should specify the business to be brought forward, and that no business should be introduced at any special meeting, in addition to that specified in the notice. The plaintiff, as one of the members of the society, having acted in such a manner as, in the opinion of the president, merited his dismissal, or expulsion from the body, a meeting for that purpose was ordered to be convened by the president, and notices were accordingly sent to all the members of the society, stating that a meeting would be held "for special business," but omitting to say what such special business was. At a meeting so called, at which the plaintiff was present, a resolution was unanimously adopted, by the other members present,

[1] See Rex v. Faversham, 8 Term Rep. 356.

expelling plaintiff from the society. The notice calling such meeting being invalid, because it did not specify the business intended to be brought before the society, a decree was pronounced declaring that such resolution of expulsion had been illegally and improperly passed. The fact that the plaintiff had attended a meeting illegally called, and had entered upon a defense before the society, did not preclude him from afterwards filing a bill impeaching the proceedings as irregular and invalid. [1]

Where a by-law required two weeks' notice of a meeting to be given, it was held that a notice posted at 3 o'clock A.M. on the 1st of the month for a meeting to be held on the 14th, was insufficient. [2]

In discussing whether the accused member's presence, and addressing the society, was a waiver of the defect, the court, in this case, said: "In the next place, the general meeting was not properly called. On the one hand, it has been said, that Mr. Labouchere attended that meeting, and entered into the discussion; that he did not protest against the meeting having been irregularly called; and that, therefore, he has no right now to complain; but on the other hand, Mr. Labouchere said, he did protest, though it does not appear what the protest was. Mr. Labouchere was not compelled to say what it was. A man might say, 'I have a good defense upon the merits. I contend that I ought not to be expelled; therefore, I am not going to run away by availing myself of a technical objection.' He was entitled to say, 'Though the meeting was irregularly called, I have such a good case on the merits, that I should like to take your opinion.' But he was not bound to tell the meeting that it was irregularly or improperly called."

The by-laws of a society provided that notice of a meeting for the expulsion of a member must be given. It was held, that a notice of "a meeting to take into consideration the conduct of a member," was not a compliance with such provision; that it should state distinctly what the object of the meeting was. [3]

By the deed of settlement of a Baptist chapel, it was provided that the minister should be liable to be removed by the direction of the church, declared at one meeting, and confirmed at a second meeting; that all directions of the church should

[1] Marsh v. Huron College, 27 Grant's Chan. Repts. (Upper Canada) 605.

[2] Labouchere v. Wharncliffe, L. R. 13 Ch. Div. 346.

[3] Cannon v. Toronto Corn Exchange, 27 Grant's Chan. Reports (Upper Canada) 23.

be declared by a majority of communicants present at a meeting of which notice should have been given in the chapel during divine service on Sunday morning at least four days previously; also that whenever the church should have to consider the appointment or dismissal of a minister, the notice should expressly state the object of such meeting, and each of the directions to be declared at any such meeting should be reconsidered at a second meeting to be convened by public notice to be given in manner aforesaid, expressly stating the object thereof.

On Sunday, the 18th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday "for the purpose of bringing charges against and considering the dismissal of" the then minister.

On the 24th of October the meeting was held and a resolution was passed that, in consequence of certain offenses alleged to have been committed by the minister, "he is not a fit and proper person to occupy the position of pastor, and that his office as pastor cease forthwith."

On Sunday, the 25th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday "for the purpose of confirming and ratifying" the resolutions passed at the meeting of the 24th; and on the 31st of October the meeting was held, and a resolution passed that the minutes of the meeting of the 24th be "passed, confirmed and ratified."

It was held, that the notice of the 25th of October was invalid in law, because it did not specify the resolutions, the intended confirmation of which it gave notice; and hence that the resolution of the 31st of October, and the dismissal of the minister, purported to have been thereby effected, were also invalid.[1]

Where, by the laws of the society, it is necessary that notice shall be given to the society of the object of the proposed meeting, the proceedings of a meeting expelling a member, held in pursuance of a notice which omitted to state the object of the meeting, are void, under the positive provisions of its laws, because of such omission.[2]

Independent of the positive provisions of the laws of a society, in order properly to exercise the right of the expulsion of a corporator, notice must be given to all the members of

[1] Dean v. Bennett, L. R. 9 Eq 625.

[2] Weber v. Zimmerman, 22 Md. 156.

the tribunal before which he is to be tried, that it is intended to consider the question of removing the particular person.

Where the power of expulsion is in the society at large, notice must be given to all the members of the society; and when the power is in a select body, each member of such body must be notified.[1]

§ 71. **Same subject continued.** In giving notice of a meeting, it is not, generally, necessary to state what business is to be transacted, when it relates only to the ordinary affairs of the corporation; but when it is for the purpose of expelling a member, that fact should be stated; for members who might think that their attendance was unnecessary for the usual routine of business, will, perhaps, feel it their duty to attend a matter involving the rights of a fellow member. The notice should be given in the manner prescribed by the charter or by-laws, or, in the absence of any such provisions, by personal notice to the members of the tribunal.

When it is intended to expel a member, it is, in general, absolutely necessary, not only that he should be summoned generally to attend, but that he should also be notified to answer the particular charges alleged against him; for it would be highly unjust, upon a general summons, to expel a member for a particulai offense, when he has no notice to prepare his answer to the charge.

It is only necessary that the notice shall be sufficient to apprise the accused of the nature and extent of the charge against him.[2]

It is too late to question the sufficiency of the notice to appear and answer the charge, after the party has appeared in person, proceeded with the investigation, and made no pretense that he had not had time to prepare for trial.[3]

A society claimed that a member had been suspended after having received notice under an article of its by-laws, which was as follows: " A member who does not pay his dues and assessments to the lodge within four weeks after the quarter, shall be notified to pay, the same within fourteen days, and if he does not pay he shall be considered in arrears, and he is not

[1] For law to prevent surprise and fraud in election and expulsion, see, Rex v. May and Rex v. Little 5 Burr. 2682; Kynaston v. Mayor etc. 2 Strange 1051; Machell v. Mayor etc., 2 Ld. Raym. 1355; Wiggin v. Baptist Church, 8 Met. (Mass.) 312; Stow v. Wyse, 7 Conn. 214; 2 Bacon's Abridg. 462-463.

[2] Gardner v. Freemantle, 19 W. R. 256.

[3] Chase v. Cheney, 58 Ill. 509.

entitled to lodge benefits. A member so in arrears shall be notified by the secretary, in writing, to pay within thirty days, in default whereof the member shall be suspended."

The dues, as to which the member was delinquent, were for the two quarters ending respectively June 30 and September 30. The only notice sent to the member in relation to the dues for the quarter ending June 30, as shown by the record, was mailed to him May 22, which was long before those dues were payable. The only other notice shown to have been sent him in relation to the dues of either quarter, was mailed October 22, and that notice required the payment of the dues of both quarters. It was not shown, as to the dues of either quarter, that after the member had failed to make payment within four weeks after the quarter, he was notified to pay within fourteen days, and, failing to make payment within that time, reached that stage of the proceedings where he could be "considered in arrears," and after becoming so "in arrears," he was again notified to pay within thirty days, and made default in payment during all that period. By the terms of the above by-law, each of these steps was clearly essential to valid suspension. "It was necessary to wait four weeks after the expiration of the quarter, and then if the dues were unpaid, to notify the delinquent to pay within fourteen days. If he still remained delinquent, he was to be considered in arrears, and when so in arrears, he was to be again notified to pay within thirty days thereafter, and it was only when the delinquency had extended to the termination of this latter period, that sentence of suspension could be pronounced."[1]

If an individual chooses to belong to a society which holds its regular meetings on Sunday, and, at such a meeting, he is served with a notice to attend the next meeting, it does not rest with him to make the objection that such notice is illegal because it was served on Sunday.[2]

§ 72. Tribunal of the society expelling a member. The power of expulsion must belong to the society at large, unless, by the fundamental articles, or some by-law founded on these articles, it is transferred to a select number.[3]

A return to a *mandamus*, which states that the member was tried and expelled by "a select number" of the society, is

[1] District Grand Lodge, etc., v. Cohn. 20 Ill. App. 335.

[2] Corrigan v. Father Mathew Ben. Soc. 65 Barb. 357.

[3] Commonwealth v. German Society, 15 Pa. St., 254; State *ex rel* v. Chamber of Commerce, 20 Wis. 63,

insufficient unless it further shows the authority of that "select number."[1]

Where the organic law of a corporation provides that such society "shall have the right to admit as members such persons as they may see fit, and expel any members as they may see fit," the power of expulsion resides in the corporation at large, and may not be delegated to a select committee or board of directors.[2]

But where the charter confers the power to expel "such persons as the association may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof"—a rule prescribing the mode of expulsion by a trial before, and a vote of, the board of directors, is justified by the language of the charter.[3]

No corporation has the power to delegate to an outside body the power of expelling a member.

Where various corporations send delegates to a grand council, whose powers in the premises are not derived from the incorporation laws of the State in which these corporations exist, it has no jurisdiction to expel members of these corporations, or to review the proceedings in expulsion, which may have taken place in any of these corporations.[4]

On the trial of a member of a lodge before a committee, an irregularity in the appointment of the committee under the by-laws, is waived by the appearance of the accused, who, having knowlege of the irregularity, does not object thereto.[5]

Where a member of an association appears before a tribunal thereof, charged with violating its rules, and submits his case to them, without objection to the manner in which the tribunal is constituted, all irregularities in the constitution of the tribunal are waived.[6]

§ **72a.** The laws of a society provided that its governing committee, to which its government and management was confided, should consist of twenty-four members, and that a two-thirds vote of the governing committee should be necessary for the expulsion or suspension of a member. At the time when certain

[1] Green v. Society, 1 Sar. & R., 254.

[2] State v. Chamber of Commerce. 20 Wis. 63.

[3] Pitcher v. Board of Trade, Ill.; 13 N. E. Rep. 187; State v. Milwaukee Chamber of Commerce, 47 Wis. 670.

[4] Allnut v. Foresters, Mich.; 28 N. W. Rep. 802; see also Lamphere v. United Workmen, etc., 47 Mich. 429; State v. Miller, 66 Iowa 26; 23 N. W. Rep. 241.

[5] Appeal of Sperry, Pa. St., 9 Atl. Rep. 478; People *ex rel.* v. St. George's Society, 28 Mich. 261.

[6] Pitcher v. Board of Trade, Ill.; 13 N. E. Rep., 187.

proceedings in expulsion were taken, the committee had been reduced in number to twenty members, and but eighteen were present when the vote for the expulsion took place. Fourteen of the members who were present voted in favor of the adoption of the resolution of expulsion, and the other four voted against it. The resolution, therefore, failed to secure the vote of two-thirds of the members of the governing committee; for to constitute such a vote, that of sixteen of the members was necessary. The judgment of expulsion in this case was irregular and illegal.[1]

Two members of a club had a quarrel, and one used abusive language toward the other. For this he was tried and expelled. One of the members of the tribunal which expelled him, was a distant relative (cousin) of the wife of the person to whom the abusive language was addressed, and the expelled member brought suit to have the resolution of expulsion declared null and void.

The court held, that although proceedings in expulsion must be characterized by honesty and good faith, yet such relationship does not disqualify the member of the tribunal from taking part in the proceeding, under the rules applicable in courts of law in case of the consanguinity or affinity of a judge to either of the parties, since the proceeding is not before a legal tribunal, nor *inter partes*, but is of a quasi-judicial character, by the club, in the way of discipline against the offending member.[2]

The mere fact that members of the tribunal have become familiar with the subject matter of the charges to be investigated, through conversations with members of the society and otherwise, does not disqualify them from serving, nor sustain a charge that they were biased or prejudiced against the party expelled.[3]

The court of a society need not observe any of the rules of law as to challenge of jurors.[4]

§ 73. Right to trial by jury does not apply to proceedings in expulsion. The constitutional provisions relative to the right of trial by jury do not apply to proceedings taken by an incorporated society for the expulsion of a member for offenses within its jurisdiction, but only

[1] Loubat v. Le Roy, 40 Hun (N.Y.), 546.

[2] Loubat v. Leroy, 15 Abb. N. Cas. (N. Y.), 1.

[3] Loubat v. Leroy, 15 Abb. New Cases, 1.

[4] Chase v. Cheney, 58 Ill., 509.

apply to trials of issues of fact in civil and criminal proceedings in courts of justice. They have no application to incorporated societies which have the power of expulsion or disfranchisement, nor to any bodies not exercising the ordinary jurisdiction of courts; nor to collateral or incidental proceedings, which are disciplinary in their character, by associations authorized by law, as to the conduct of their members who have voluntarily submitted themselves to their jurisdiction.[1]

§ 74. Regularity of proceedings in expulsion. Under articles providing for the appointment of a committee of investigation by the presiding officer, without directing how or when, an appointment made immediately after the adjournment of the meeting which passed the resolution of reference, by the second vice-president who had presided at that meeting, and a subsequent appointment by the first vice-president to the places of two members first appointed who had refused to act, are not open to objection as to the source or time of the appointments.[2]

A member was notified that on a certain night he would be tried by his lodge upon certain charges. He thereupon notified the principle officer of the lodge that, owing to certain duties which he was obliged to perform as county surveyor, he could not be present at the time and place fixed for the trial of the charges. He made no application for a continuance based on proof of the fact that he had public duties to perform at that time. He was tried at the time set, and expelled. The court held that the notice to the principal officer was not of itself sufficient to oust the lodge of jurisdiction to try the member on the charges at the appointed time and place.[3]

A society has no right to expel a member merely because he does not appear, and without proving the charges against him. Even though the party charged does not appear, still, proof of his offense should be required.[4]

In Rex v. Faversham, 8 T. R. 356, the return to the *mandamus* was quashed because the member had been removed without proof of the offense wherewith he was charged, his presence and failure to deny the charge having been taken instead of proof.

[1] People v. N. Y. Com. Association, 18 abb. Pr. (N. Y) 271; *In re* Newell Smith, 10 Wend. (N. Y.) 449.

[2] People *ex rel.* v. St. George's Society, 28 Mich., 261.

[3] Robinson v. Yates City Lodge, 86 Ill. 598.

[4] People v. Benevolent Society, 65 Barb., 357

Where an incorporated society, in its by-laws, adopts the rules in Cushing's Manual for the government of all debates of its members, and no other provision is made on that subject in the by-laws, Cushing's Manual must control the members of the society in that matter. That provides that if offensive words are not taken notice of at the time they are spoken, but the member is permitted to finish his speech, and then any other person speaks, or any other matter of business intervenes before notice is taken of the words which gave offense, the words are not to be written down, nor the member using them censured. Therefore, where a member in debate, at a meeting of the society, uses what are considered offensive and improper words which are not objected to or noticed at the time, or during the meeting, he may not be tried and expelled for using those words, upon charges made at a subsequent meeting, even though the use of such words was, under the charter and by-laws, a sufficient cause of expulsion. An expulsion under such circumstances is irregular and without authority.[1]

When a member appears before the tribunal of a society, charged with violating its rules, and submits his case, without objection to the mode of its proceeding, all irregularities therein are deemed to be waived.[2]

§ 75. Regularity of proceedings continued. When a member has been regularly tried before an incorporated society which requires a two-thirds vote of the members present to expel a member, and more than one-third of the members present vote against the resolution to expel him, this amounts to an acquittal. A subsequent trial and expulsion, on the same charges, for the same offense, is irregular and void.

A member who has been regularly tried and acquitted by a society, may not be twice put in jeopardy before the society for the same offense.[3]

But where a member has been irregularly and illegally expelled from a society, the society may set aside and annul the void proceedings, restore the member, and proceed against him regularly for the same offense.[4]

[1] People v. American Institute, 44 How. Pr. 468.

[2] Pitcher v. Board of Trade, Ill., 13 N. E. Rep. 187.

[3] Commonwealth v. Guardians of Poor, 6 Sar. & R. (Pa.) 469.

[4] State *ex rel.* v. Chamber of Commerce, 47 Wis. 670; But see Otto v. Benevolent Union, Cal. 17 Pac. Rep. 217, where the reinstatement of the member for the purpose of expelling him again was taken as evidence of bad faith.

In the absence of any fixed rules of procedure in the constitution and by-laws of a society, the question is not whether the proceedings for the hearing and expulsion of a member might not have been conducted differently, and more in conformity with those which obtain in courts, under statutes and fixed rules, but whether or not the principles of natural justice have been violated in withholding from him a fair and inpartial hearing, before the passage of the resolution for his expulsion. So long as he has had notice, and an opportunity to be fully heard, he can have no reasonable ground of complaint on account of this or that omitted step or form, on the part of the tribunal thus acting quasi-judicially.

Courts will take cognizance of the right of a tribunal to proceed with the trial of a member, but not of matters which relate to the mode of procedure.[1]

They will, therefore, take no cognizance of a refusal of the tribunal to issue a commission to take testimony; of its refusal to grant a new trial[2]; of the alleged misconduct of a member of the tribunal, etc.; these being matters which relate to the mode of proceeding, and not to the right to proceed.

And for the same reason, they will not consider the fact that the witnesses were not sworn when examined by the tribunal, where the contract does not expressly provide that they shall be sworn.[3]

Where, under the constitution and by-laws of an unincorporated mutual benefit society, charges are preferred against a member who is apparently and actually of unsound mind, his failure to appear and answer is not excused by his insanity, and the society may regularly proceed, according to its laws, to convict him of neglect to appear, and punish him by expulsion and the loss of all rights in the society. In considering this question the Court said: "It is claimed that Pfeiffer, being apparently and actually of unsound mind, could not be duly summoned or convicted of neglect to appear, and punished by expulsion and the loss of all rights in the society. There is no force in this point. A person who has even been adjudged a lunatic, and of whom a committee, both of person and estate, has been appointed, may be sued at law, and the judgment recovered against him is not void. It would be a contempt of the court which appointed the committee to sue without leave, but the judgment is valid. There was no

[1] Walker v. Wainright, 16 Barb. 486; Chase v. Cheney, 58 Ill. 509.

[2] Walker v. Wainright, *supra*.

[3] State *ex rel.* v. Algemeiner etc. Verein. 3 Cin. Law Bull. 295.

reason why the lodge should not proceed against a person not adjudged a lunatic. He could have been defended and his rights protected. If they were not, the lodge might regularly proceed according to its laws. His alleged insanity did not excuse his failure to appear."[1]

The judgment of a proper tribunal of a society, in trying a member on charges which, by its constitution and by-laws, it was authorized to try, will not be examined into by a court on the weight of evidence, or its competency.[2]

§ **76. Regularity of proceedings continued,** When the laws of a society provide that a member may be expelled for refusing to comply with the decision and order of its tribunal, in any matter submitted to the tribunal under the by-laws, it is error to expel a member for such refusal, when he has, under the by-laws, appealed from the decision of the tribunal to the society at large.

When a member has submitted a controversy to such tribunal, and appealed from its decision, under the provision of the by-laws, giving the right of appeal, the society has no right to proceed against him for a failure to comply with such decision, and the denial to him of his right of appeal from such decision is an irregularity and an error, from the effects of which a court of equity will afford him relief.[3]

A court of equity has jurisdiction of causes of action within the control of the tribunals ordained by the constitution and by-laws of an unincorporated society, where some material irregularity in the proceedings is shown to have occurred, which has not been waived by the suitor.

The exclusion of a competent witness offered by the accused, on the ground that he is incompetent, is a mistake of judgment, and not an irregularity of procedure. If, on appeal to the higher tribunals of the lodge, the expelled member omits to complain of this mistake, he waives any right to have the error inquired into in a court of equity.[4]

But it is certainly true, as urged in the dissenting opinion of Justices Green and Trunkey, in the case just cited, that where it is evident from the whole facts surrounding the case that the exclusion of the witness took place, not as a mistake of judgment, but as a part of a plan to exclude the member from benefits to which he was justly entitled, and in bad faith toward the accused, then the court should reinstate the expelled

[1] Pfeiffer v. Weishaupt, 13 Daly 161.

[2] Blumenthal v. Chamber of Commerce, 7 Cin. Law Bull. 327.

[3] Powell v. Abbott *et al.*, 9 Weekly Notes of Cases, 231.

[4] Appeal of Sperry, Pa; 9 Atl. Rep. 478.

member. While every presumption is in favor of the fairness of proceedings in expulsion, still where a member's judges, jurors, accusers and debtors, are one and the same—namely, the society to which he belongs, mistakes of judgment upon the trial must not be so gross and inexcusable as to lead to the conclusion that they were intentional. If they are, the member should be reinstated.

§ 77. **Statute of limitations.** In the absence of any provision on the subject in the constitution and by-laws of a society, there is no limitation as to time, to the inquiry by the society as to offenses under its laws; the statute of limitations does not govern such inquiry, unless it be made a part of the laws of the society.[1]

§ 78. **Good faith in proceedings in expulsion.** Malice, though not a crime, is a quasi crime, and is never to be presumed by the courts. It must, when relied upon as invalidating an expulsion, be charged and proved specifically. The books speak of malice on the part of committees and societies in matters of expulsion; and in applications for reinstatement to membership and suits for damages for wrongful expulsion, there are usually strong allegations of malice and bad faith in the proceedings of expulsion; and yet in the adjudicated cases there is little said upon the subject of malice and bad faith, except the decision of the court that, in the particular case in hand, there is, or is not, sufficient evidence of malice and bad faith to set aside the expulsion.

It has never been decided whether malice may be shown by proving that each individual was independently actuated by malice, or whether it must be further shown that the members of the tribunal, whether composed of a committee or the whole society, had combined together, and agreed upon an illegal proceeding.

Where malice and bad faith in the proceedings in expulsion are charged, the court will permit the members of the tribunal to testify as to the motives under which they acted in such proceedings—will permit them to give their reasons for voting in favor of the expulsion of the member, and to declare that they did not exercise their power capriciously, corruptly, unjustly or maliciously. They may also state that they acted *bona fide*, and were not influenced by the persons pressing the charges.[2]

[1] Chase v. Cheney, 58 Ill., 509.

[2] Lyttleton v. Blackburn, 33 L. T. Rep. (N. S.) 642; Gardner v. Freemantle, 19 W. R., 256.

Membership.—Part V.

SEC. 79. Reinstatement of member to his rights. Remedies provided for the expelled member in the laws of the society.
SEC. 80. Delay or unjust procedure of superior tribunal of society.
SEC. 81. Appeal to superior tribunal, "whose decision shall be final."
SEC. 82. Death of member pending his appeal.
SEC. 83. Action against society for damages for wrongful expulsion.
SEC. 84. Effect of action for damages for wrongful expulsion.
SEC. 85. Injunction to restrain illegal expulsion.
SEC. 86. Injunction to reinstate expelled member.
SEC. 87. Decree of court reinstating member must be presented to society.
SEC. 88. Subordinate society refusing to obey orders of superior body.
SEC. 89. }
SEC. 90. } Records of proceedings in expulsion.
SEC. 91. Double sentence of society in judgment upon members.

§ 79. Reinstatement of member to his rights. Remedies provided for the expelled member in the laws of the society. Where a voluntary society provides, in its charter, constitution or by-laws, a mode for reviewing and correcting any error or injustice on the part of any subordinate tribunal by which a member has been tried and expelled, he is bound to avail himself of the remedy so provided, before he may ask a court of equity to investigate the regularity of the proceedings. These proceedings, being subject to review, may be annulled by the action of the tribunals created in the society and clothed with authority to investigate the proceedings of such subordinate tribunals; and those who fail to avail themselves of the opportunity thus offered to correct these irregularities within the society, will be repelled from the courts.

Courts will not in any wise interfere with, or inquire into the affairs of such societies until they are obliged to act, and until the aggrieved member has exhausted all the remedies provided in the society. It is not necessary that the laws of the society shall provide in express terms that the member must appeal from the decision expelling him, to a higher tribunal in the society, before seeking restoration in a court of justice; the mere right to appeal from such decision, for the reasons above stated, creates a duty on the part of the expelled member to exhaust his right of appeal in the society.[1]

[1] Karcher v. Supreme Lodge K. of H. 137 Mass. 368; Harrington v. Workingmen's Ben. Association, 70 Ga. 340; Poultney v. Bachman, 31 Hun (N. Y.) 49; White v. Brownell, 2 Daly 329; Lafond v. Deems, 81 N. Y. 507.

There is no presumption that there is open to the expelled member a remedy, under the constitution and laws of the association itself, for a review of the proceedings in his expulsion, and, in case of error, for his reinstatement. This must be made to appear.[1]

It has been held that this rule only applies, in its strictness, to those cases in which the right is given, of appeal to an officer or a tribunal other than the tribunal which convicted and expelled the member. When the remedy provided in the society is not in the nature of an appeal to a higher officer or body, or to a superior tribunal, but is merely in the nature of a petition for a rehearing to the same persons who convicted and expelled the member, the court will examine into facts concerning the trial and expulsion, and determine whether, under all the circumstances, the aggrieved member should have applied to them for a reconsideration of the case upon its merits before resorting to the court.

A resolution of expulsion was adopted by the governing committee of a society, by a vote of fourteen to four, upon the report of a committee of five of its members, who had been appointed to investigate and report as to the facts. The by-laws of the society provided that in cases of expulsion the expelled member might make an application to the governing committee for a rehearing. The expelled member, however, without making such an application as he was authorized to do by the by-laws, resorted to the court. It was claimed that, before bringing the action, the plaintiff should have applied to the committee to have the resolution of expulsion reconsidered and revoked, and that, in consequence of his failure to do so, the court would refuse to interfere in his behalf But the court, in considering this question, said: "The resolution which they (the members of the governing committee) adopted, conclusively establishes the fact that they had formed and acted upon convictions adverse to the plaintiff, and, after that, the probability is extremely slight, indeed, that they could have been induced to change their views and act differently upon an application for the reconsideration of the resolution. The probability that favorable action might in this manner have been secured by the plaintiff is so extremely remote that, in the reasonable administration of the law, he should not be held to be required to apply for such reconsideration before commencing an action to restrain the enforce-

[1] Olery v. Brown, 51 How. Pr. 92.

ment of the resolution against him, if that should turn out to have been unlawfully adopted."[1]

This distinction is not sustained by analogy to proceedings in courts of law, for a motion for a new trial is required to be made before the tribunal in which the trial took place, before an appeal may be prosecuted. It is but fair that the tribunal in which the trial took place should have an opportunity to correct its errors, and it is to be presumed that such tribunal will act in good faith upon the application.

Because the members of a tribunal have formed, and acted upon, convictions adverse to a member, it must not be assumed that they will continue to hold those convictions after they have looked carefully into an application for a reconsideration of their acts in the premises. Every presumption is in favor of the fairness and honesty of a tribunal which has expelled a member from a society. The interests of the fellow-members are, naturally, that the rights of each individual member should be sedulously guarded, as the same measure they apply to others may in the end be administered to themselves.

The obligation to appeal to the higher tribunals within the society is not imposed where the judgment is void for want of jurisdiction. Such a judgment of expulsion may be likened to a judgment rendered by a court which has no jurisdiction of the subject matter or the person. No appeal or writ of error is necessary to get rid of such judgment; it is void in all courts, and in all places.

Thus, a suspension of a lodge by an officer not vested by the laws of the order with that power, and without notice and opportunity to the lodge for a hearing, is absolutely void, and cannot effect the legal rights, or change the legal status of the lodge or any of its members, and from such an order of suspension no appeal, in the mode provided in the laws of the order, is necessary to save the rights of the lodge or its members.[2]

§ 80. Delay or unjust procedure of a superior tribunal of society. If, however, when he has appealed to a superior tribunal, the member is practically deprived of the benefit of such remedy, by evasion, intentional delays, or other unjust procedure on the part of such tribunal, he may

[1] Loubat v. Le Roy, Treas. Union Club, 40 Hun (N. Y.) 546.

[2] Hall v. Supreme Lodge, 24 Fed. Rep. 450.

resort to a court of equity, alleging and proving such evasion, delays, or other unjust procedure, as an excuse for not having exhausted his remedy in the society. But it must clearly appear in such a case that the appellate tribunal is acting in bad faith and in practical disregard of the member's right of appeal.[1]

§ 81. **Appeal to superior tribunal "whose decision shall be final."** The constitution of an unincorporated society provides that "any member having a grievance, shall have the right to lay his case before the central body, who shall take action thereon, and whose decision shall be final." A member of the society, who had been expelled, applied to the central body for reinstatement to membership, but his application was, by that body, denied. He then instituted a proceeding for reinstatement in the courts. It was urged that the court had no jurisdiction, and upon this question the court said: "No doubt when action is properly taken in the manner indicated, it is final, and the courts will not interfere, but when, under the guise of remedying the grievance of a member, the central body acts in bad faith, and maliciously makes the subject of the grievance a pretext for oppression and wrong, its actions may, however, to that extent, be the subject of review."[2]

§ 82. **Death of member pending his appeal.** A member of a lodge of Knights of Honor was expelled by his lodge, and he appealed to the grand dictator. Pending the appeal he died. Subsequently the judgment of expulsion was reversed by the grand dictator; he was reinstated by vote of the lodge; and his assessments due up to the time of his death were received.

The court said: "If the analogies of the common law are to be regarded, the appeal did not abate by the death of (the member). Green v. Watkins, 6 Wheat. 260. By the reversal of the sentence of expulsion, and by the action of the lodge, he was reinstated as at the date of his expulsion; and was entitled to his benefit. It may be added that such was, at the time, the law of the order, which had held, by its supreme dictator, that if a decision of expulsion was reversed on final appeal, the appellant stands a member as if there had been no such judgment, and he must pay all back dues and assess-

[1] Carlen v. Drury, 1 Ves & Beames 154. (see case); White v. Brownell, 2 Daly 329.

[2] Otto v. Journeymen Tailors' etc. Union, Cal; 17 Pac. Rep. 217.

ments; and if, pending the appeal, he dies, has regularly tendered his dues and assessments, and after death, the appeal is decided in his favor, his benefit will be paid as one who died in good standing, less the amount of his tendered and unpaid dues and assessments.[1]

§ 83. Action against society for damages for wrongful expulsion. A member of a corporation may lawfully sue the corporate body for an injury which he sustains from the misconduct of its officers or agents.[2]

Where the power of expulsion is delegated to a select body, —a committee, or board of directors—the society is to be considered as having done all that the select body did in the proceedings in expulsion.

In a suit for damages for wrongful expulsion, it is not sufficient for plaintiff to aver that the proceedings of expulsion were irregular and void, or that the charges against him were not such as he might lawfully be expelled for under the contract of membership, or that he had no notice of the meeting at which he was expelled, or of the charges against him. He may not sue for loss of membership if the adjudication is void. In such a case his remedy would clearly be to enforce, by *mandamus*, a right he still has; his remedy would not be to get damages for its loss.

But where a society, acting upon a void adjudication of expulsion, deprives a member of his rights as such, it commits a trespass upon him, and is liable in damages for the trespass. It is not necessary for the member to show that he was assaulted and put out of a meeting of the society, or that, in attempting to enter, he was violently laid hold on and kept out. It is sufficient to show that he was physically kept out; that he could not have gone in without bringing about a breach of the peace or an assault. He need not put the matter to a test.[3]

Where it is merely claimed that proceedings in expulsion took place in the society, and it is the legal effect of the expulsion, in depriving the member of his rights, that is complained of, it is necessary for the plaintiff to aver and prove that his

[1] Marck v. Supreme Lodge K. of H. 29 Fed. Rep. 896.

[2] Gray v. Portland Bank, 3 Mass. 385.

[3] Blumenthal v. Cincinnati Chamber of Commerce, 7 Cin. Law Bul. 327. But see Innes v. Wylie, 1 Car. & Kir. 262.

expulsion was without reason, was malicious, and in bad faith, in order to entitle him to damages. [1]

§ 84. Effect of action for damages for wrongful expulsion. The bringing of an action by a person who has been illegally expelled from an incorporated society, to recover damages for deprivation of his rights and privileges, is a waiver of his right to a *mandamus* to restore him to membership.

A member of an incorporated society was expelled, without any notice to him or knowledge on his part. After such expulsion he brought an action to recover damages for the loss of his rights and privileges as a member, occasioned by such expulsion, and in the action he recovered a verdict and judgment for $275. While this cause was pending in error in an appellate court, the member sought by *mandamus* to be restored to membership in the society. In considering the effect of the action for damages upon the application for the writ of *mandamus*, the court says: "The gravamen of this action is, that by the expulsion he has lost all the rights and privileges of membership. That being true, the satisfaction of his judgment is compensation for all he has lost, and nothing remains for which he can complain further. But without such judgment, if he brings his action for these causes, that action is based upon the theory that he has lost membership and all his rights, and that he cannot be restored thereto; otherwise he has no cause of action. If his rights are not gone, and gone irrevocably, his petition is not true when it says he has been deprived of those rights. In bringing such action, therefore, in order to maintain it, he necessarily abandons all interest in the society."[2]

And where a person, formerly a member of a mutual benefit society, sues the society for benefits, and the question of his proper expulsion is inquired into and determined under any of the issues presented in the case, both the plaintiff and the society are concluded by such determination, unless the decision is appealed from.

An expelled member commenced an action against the society for the recovery of weekly allowances. His claim

[1] The remedies of a member for the wrongful refusal of the society to accept assessments upon his certificate, based on the ground that he is no longer a member of the society, are treated of in the chapter on "Assessments," under the head of "Refusal of society to accept assessments—remedy of member."

[2] State *ex rel.* v. Slavonska Lipa *et al.*, 28 Ohio St., 665.

embraced a period before his alleged expulsion, and extending beyond it. Among the defenses interposed to his right to recovery was that of the plaintiff's expulsion prior to the bringing of the suit upon his claim.

A judgment was rendered in this action for weekly allowances up to the date of his expulsion, but his claim for benefits after that period was rejected. Upon the trial the record of plaintiff's expulsion was given in evidence, and other evidence was also given touching the regularity of the expulsion under the rules of the society.

The plaintiff might, perhaps, have avoided a decision upon the question of his expulsion, had he limited his claim to the time of the alleged expulsion, and could then have properly invoked the aid of the court to annul the record of his expulsion, if he had sufficient cause therefor; but by including in his claim for weekly allowances a period beyond his expulsion, and by submitting the question of its regularity to the decision of the court upon the trial of the claim, he became bound by its decision, and his only remaining remedy was by appeal from the judgment.

Upon application, made after the rendition of this judgment, for restoration to membership, the court dismissed the plaintiff's complaint upon the sole ground that the question of his expulsion had been determined against him on the trial of his claim.[1]

When a matter is regularly determined, in whatever form, by a competent tribunal, it is not open to inquiry in any other proceeding between the same parties. A judgment at law is conclusive in equity upon the same subject between the same parties. And where the legality of the expulsion of a member is once judicially determined in a legal or equitable controversy between the parties, in which an issue involving the question has been distinctly raised, the door to further inquiry upon that subject is forever closed.

§ 85. Injunction to restrain illegal expulsion, etc. Courts of chancery have jurisdiction in a great variety of cases to enjoin parties from proceeding in courts of law.

Their jurisdiction extends as well to proceedings in the highest as in the lowest and most limited tribunals; and courts of one state may enjoin parties from proceeding in the courts of other states.

[1] Bachman v. Arbeiter Bund, 64 How. Pr. (N. Y.), 442.

But injunctions issue against parties, and not against courts; and the jurisdiction in this respect has legal limits which apply to proceedings in all courts and tribunals.

The proceedings of a society in expelling members are judicial in their character, and, in such proceedings, the society performs the functions of a court of limited and special jurisdiction. A court of chancery has no more power over the proceedings of a court of special and limited jurisdiction than over proceedings of courts of general jurisdiction. Where the inferior tribunal has jurisdiction of the subject matter, a bill in equity will not lie to correct and restrain alleged irregularities in the pleadings and procedure before it; nor will it lie to enjoin the tribunal from a judicial determination of the matter before it, in order that the court may inquire into the alleged improper constitution of the tribunal.

The general principle is, that a court of chancery is not the proper tribunal to correct the errors and irregularities of inferior tribunals, and that in ordinary cases the court may not interfere.[1]

A medical society, incorporated under a charter empowering it to expel its members, summoned the plaintiffs, who were members, to appear before a board of trial composed of members, to answer charges preferred by a committee, that the plaintiffs had violated the by-laws of the society by conduct unworthy of honorable physicians and members of the society, in practicing according to a certain exclusive theory or dogma, and that plaintiffs belonged to an association whose purpose was at variance with the principles of the society.

Plaintiffs, thereupon, filed a bill in equity against the society, the board of trial, and the committee preferring charges, alleging that it was the defendants' intention to expel the plaintiffs only and solely for practicing homœopathy; that the body to try them was wrongfully constituted; and that the proceedings were irregular and void. The Supreme Court of Massachusetts held that the court had no jurisdiction to interfere by injunction with the proceedings before a court of limited and special jurisdiction.[2]

§ 86. Injunction to reinstate expelled member. There are several cases in the books, in which expelled

[1] Kerr on Injunctions, c 3 and cases there cited; Movers v. Smedley, 6 Johns Ch. 28; Heywood v. Buffalo, 4 Kern, 534.

[2] Gregg v. Massachusetts Medical Society, 111 Mass, 185; See Sturges v. Board of Trade of Chicago, 86 Ill. 441.

members have exhibited bills in equity against their societies complaining of their illegal expulsion, and praying an injunction to restrain the society from interfering in any manner in the full enjoyment of their rights, privileges and franchises of membership.

It is evident, however, that in these cases the members have mistaken their remedy.

Injunction is a preventive remedy. It comes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be applied correctively so as to remove it.[1]

Nor will such a bill for an injunction be aided by an allegation that a petition for *mandamus* has been filed in a court of law, praying that the society show cause why a writ of *mandamus* should not be issued, requiring it to restore the complainant to all his rights, privileges and functions of membership.

Resort may not be had to the writ of injunction, either directly or indirectly, to obtain affirmative relief.

Where a party is excluded from membership in an incorporated society, the rightfulness of his expulsion must be tried at law, and, until his rights are thus settled, a court of equity will not interfere, by injunction, to restore him to his position, even though he may suffer a loss of profits which he might make through his membership before the action at law can be determined.

An injunction should not be awarded in doubtful cases. Its use is the exercise of a delicate power, which should not be encouraged by courts, except in clear and well defined cases falling within principles of equity jurisprudence, sanctioned by well adjudicated precedents. The injury which an expelled member of a board of trade or chamber of commerce may suffer in the loss of profits which he might make by reason of the privileges of membership, cannot be regarded as sufficient to justify a court of equity to interfere by injunction and place the expelled member in the full enjoyment of the rights and privileges of membership, without stopping to inquire whether the expulsion was legal or illegal.[2]

The plaintiff, who had been expelled from the board of trade of the city of Chicago by the board of directors thereof,

[1] Wangelin v. Goe, 50 Ill. 463; Menard v. Hood, 68 Ill. 122.

[2] Wangelin v. Goe, 50 Ill. 463; Fisher v. Board of Trade, 80 Ill. 85; Baxter v. Board of Trade, 83 Ill. 146.

brought suit in equity to obtain an injunction to restrain said board from interfering with his access into the hall of the association, and with his carrying on his business therein. He alleged that two of the directors were not naturalized citizens of the United States; that two of them were prejudiced and unfair; that some did not hear the evidence, but read it after it had been written out; that the prosecuting witness was improperly sworn before a notary public, and that plaintiff was not guilty of the charges brought against him.

The court held that such a proceeding was not proper, as it was an attempt to attack collaterally the judgment of expulsion. [1]

It was held in Leech v. Harris, 2 Brewster (Pa.) 571, by the judge of the Court of Common Pleas for Philadelphia, that an injunction will lie to restrain a contemplated illegal expulsion. In stating the grounds of this decision, the court says: "Equity prevents mischief. It does not wait until it is consummated. It does not even measure the paces by which it advances. It meets it at the threshold, and seeks to prevent a meditated wrong more often than to redress an injury already done. Courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which special injunctions shall be granted or withheld"; citing 2 Story's Equity Jurisprudence, §§ 862, 959, b.

§ 87. Decree of court reinstating member must be presented to society. One who has been expelled from membership in a society, but who has been subsequently reinstated by a decree of court, should present the decree in a regular manner, serve it on the officers of the society, and demand his reinstatement of such officers. He may not assert his *status* by simply appearing at the next regular meeting after the decree and insisting upon his rights, without informing the officers, in a regular manner, of the action of the court. If, while so appearing and insisting upon his rights, he is ejected from the hall in which the meeting is held, he cannot recover damages at law. [2]

§ 88. Subordinate society refusing to obey order of superior body. In an action by a benevolent society against a member for money loaned, the defense was

[1] Pitcher v. Board of Trade, Ill; 13 N. E. Rep. 187.

[2] McLafferty *et al.* v. Sweeney, Pa.; 9 Atl. Rep. 277.

that the defendant had been wrongfully deprived of membership in the lodge, and money privileges thereto appertaining, exceeding plaintiff's claim, and that, upon defendant's appeal from such expulsion to the grand lodge, according to the society's rules, his reinstatement was ordered, which order the local lodge refused to obey. It was held that a court of equity would refuse to aid plaintiff until the order of reinstatement was obeyed, according to the society's rules, although the grand lodge itself had no mandatory powers to enforce its superior authority; that the court would grand relief in equity by refusing to enforce payment of the claim of the society against such member, until the case was heard on its merits.[1]

§ 89. **Records of proceedings in expulsion.** It is a maxim of the law that "a corporation speaks by its records."

It will be presumed that entries made in the minutes of meetings of a society, have been made by the proper officer.

The records which every corporation is supposed and bound to keep, must show upon their face the exact cause of expulsion, and all of the proceedings necessary to authorize action upon its part. These facts should be determined by the record itself in case they are brought in question.[2]

Where the laws of the society require that charges preferred against a member be read in open lodge, that a copy of them be furnished to him under the seal of the lodge, and that he be cited to appear to answer them, the record should show that these requirements were fulfilled; and a mere record of a sentence of expulsion, or suspension, without any record of the proceedings to found this sentence upon, is a nullity.[3]

While it may possibly be permitted to contradict the records of a voluntary society, or show that such records do not fully disclose all the proceedings of the body, which ought to be recorded, yet it is clear that proof of that kind must be so convincing and satisfactory as to leave no doubt but that the matter attempted to be interpolated into the records of the proceedings of the society actually occurred. Where the records of each meeting are read at each succeeding meeting, and are subject to correction at such succeeding meeting, the

[1] Schmidt v. Abraham Lincoln Lodge, Ky., 2 S. W. Rep. 156.

[2] Roehler v. Mechanics Aid Society, 22 Mich. 86; Medical Society v. Weatherly, 75 Ala., 248.

[3] Lazensky v. Supreme Lodge, 31 Fed. Rep. 592.

presumption will be strong in favor of their truth and exactness.[1]

§ **90.** It is evident that the records of a voluntary society are as much the records of one member as of another, and that they are evidence against him.[2]

Books of an incorporated society are evidence in disputes between members of the society, but they are not evidence against strangers.[3]

The minutes and reports in writing are the best evidence of what took place in meetings of the tribunal which expelled a member, for upon them the resolution of expulsion is based. In an action by a member of a society, who has been expelled, to have the resolution of expulsion adjudged null and void, a member of that tribunal may not, as a witness, make any statement as to what particular conduct, on the part of the expelled member, was deemed by the tribunal improper and prejudicial. Such a statement would be his opinion merely. What is wanted, in such an action, are the facts, not the conclusions or judgment of the witness. It would clearly not be permitted to the witness to place his interpretation upon, or give his opinion of, the proceedings and actions of the tribunal which are evidenced by such minutes and reports. Nor may such a witness be asked to state what conduct on the part of the expelled member, he, as a member of the tribunal, deemed to be improper and prejudicial to the society. When the witness voted upon the resolution of expulsion, he performed a judicial act, and he may no more be asked to state the particular ground upon which he based his judgment than a judge, a juror or arbitrator could, after judgment, be questioned as to the reason or basis of his determination.

Inquiry into what was said by members of the tribunal, during the investigation, about the charges and the guilt of the accused member, would violate the sanctity of such proceedings, and weaken their efficiency. Such inquiry is clearly opposed to the policy out of which such investigations originate, and by which they are to be conducted. Such investigations are in their nature judicial. If the conduct and action of the members of the tribunal, in the discussion and decision of questions before it, are to be the subject of public discussion

[1] Hawkshaw v. Supreme Lodge, 29 Fed. Rep. 770.

[2] Diehl v. Adams County Mutual, 58 Pa. St., 443.

[3] Commonwealth v. Woelper *et al.*, 3 Sar. and R. (Pa.) 28.

and comment, it would greatly embarrass them, and prove to be a restraint upon a free debate on the questions involved. What member of the society would be willing to serve on such a tribunal, if his remarks, concerning the matters for discussion and decision, could be made public? With the result of the discussion, as expressed by a proper and sufficient vote, the parties must be satisfied.[1]

§ 91. **Double sentence of society.** A society may, in proper cases, by its by-laws, provide for the imposition of a fine, suspension, or expulsion. It may provide for a double punishment, as for fine and suspension. But it is well settled that, in the absence of direct provisions, the power to give an alternative sentence does not authorize a double one, and that such a sentence is void.

[1] Loubat v. Leroy, 65 N. Y. 138.

CHAPTER IV.

Suits By or Against an Unincorporated Society.

SEC. 92. Proper parties to actions.
SEC. 93. As to actions by a society, or a member, for recovery of its property.
SEC. 94. As to actions by a particular officer of a society.
SEC. 95. Suits on behalf of members as such.
SEC 96. Injunction restraining libel on society.
SEC. 97. Judgment against unincorporated society.

Sec. 92. Proper parties to actions. The old rule was that, in suits by or against an unincorporated voluntary society,—whatever the number of its members, or the nature or extent of the object undertaken—the society was looked upon as in the nature of a partnership, and all the members were necessary parties. But by statute, both in this country and in England, this rule has been modified to suit the exigencies of modern practice.

It would serve no useful purpose to recite in this treatise the exact changes which each state has made in the old rule, and it is only necessary here to state the modern general rule, —sometimes called the equity rule. If the members of the society are so numerous that they cannot be made parties to the cause, with any chance of bringing it to a hearing, in consequence of abatements and like difficulties, then suit may be brought in the name of one or more for the use of all—or, two or three members may be made defendants to represent the interests of all. If there should be two or more classes of members, who have separate or conflicting interests, then a small number may be selected from each class to represent that interest, in the same way as if the whole class had been brought before the court.

It sometimes happens that there is a class of members of a society who have conflicting interest with the others; then the plaintiffs, if the class to which they belong is very numerous, put forward two or three of their number, who sue on behalf of themselves and all the others of that class, and

make the other members defendants, who have conflicting interests; or, if the defendants are numerous, make some of them defendants on behalf of the rest.[1]

A statute provided that "when the question is one of a general or common interest of many persons, or where the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the whole." Plaintiffs sued "on behalf of themselves and the other stockholders of the association, who may come in and contribute to the expense of the suit." The court held that the complaint showed a compliance with the statute and said: "If the plaintiffs could have required from all other parties interested who may come in and avail themselves of the benefit of the action, to contribute to the expense, stating this condition in the complaint cannot affect their rights in this particular, or prevent them from prosecuting the action. The liability to share the expense was the practice in the court of chancery; it has not been abolished, or in any way affected by the recent legislative changes in our practice. * * * One or more parties, therefore, of a numerous class, have a right to state that they sue for the benefit of the whole, or of those interested, who may come in and contribute to the expense."[2]

Where one party brings a suit, under such a statute, for the benefit of many having a common interest, but too numerous to be brought before the court, it is sufficient if they are described with as much certainty as the nature of the controversy will admit.[3]

To enable a member to bring a suit in his own right, and on behalf of others having a common interest, it is not sufficient to allege that the other parties are so numerous that it would be impracticable to bring them all before the court, but the nature of their common interest must appear to be such as would entitle them, were they all before the court, to maintain the action in their own right, or in their own names.[4]

In an action against an unincorporated society, except when the statute permits it to be sued in the name adopted by it, the members are the proper parties; but where the trustees

[1] Bromley v. Williams, 32 Beav., 177. 1 Daniell's Ch. Pr., 27.

[2] Dennis v. Kennedy, 19 Barb. N. Y., 517; Stadler v. District Grand Lodge, 3 Am. L., Rec. 589.

[3] Sourse v. Marshall, 23 Ind., 194.

[4] Habicht v. Pemberton, 4 Sanford's (N. Y. Superior Ct), Repts., 657.

only are sued, if they are members, the defect is one of parties only, is waived if not objected to, and the trustees will, after judgment, be presumed to have been members.[1]

§ 93. As to actions by a society or a member for recovery of its property. A member of an unincorporated society cannot maintain, in his name, for the benefit of the society, an action on a note given to or held by the society, without showing by his complaint or declaration that he is the general agent of the society, or that he is specially authorized to bring the suit for, and on behalf of the society, and without further showing that, under the contract and agreement by which the members are formed into and united as a society, the members themselves have a legal title to maintain the suit. The right to maintain the action must be shown to be in both the members at large and the member suing. Although the complaint or declaration avers that the society is unincorporated, it by no means follows that its individual members have, therefore, a right to maintain an action in their own names, and for their own benefit, upon every security given to the society, or to third persons for account of the society. Their right to do so must depend upon the nature of the association, and the terms and conditions of the agreement by which its members are united.

Although the society is not incorporated, its members are not necessarily either partners or joint owners.

They may have only an equitable, and that only an eventual and contingent interest in the property and funds of the society, and to permit them to appropriate these to their own immediate use, by a recovery in their own names, or by one on behalf of others, might be to aid them in deceiving the public, and defrauding creditors.

These observations show not only the propriety, but the necessity, of requiring that the contract or agreement by which the members are formed into and united as a society, shall be set forth, as the only means of enabling the court to determine whether they have a legal title to maintain the suit; and whether a member suing on behalf of the society has such an authority as can enable him to bring suit in his own name for its property, is a question of law, which can only be determined when the whole nature and terms of his authority shall be set forth.[2]

[1] Matoon v. Wentworth, 4 Cin. L. Bull., 513.

[2] Habicht v. Pemberton, 4 Sandford's (N. Y. Superior Ct.) Repts. 657.

§ 94. **As to actions by a particular officer of an association.** Where a written promise to pay money is made to "the treasurer of" an unincorporated society, no action can be maintained by the treasurer against the promisor.

"To maintain that (the treasurer) has a right to the action, would be to put him upon the same ground he would occupy, if the association had been incorporated, and made capable by its charter, of suing in the name of whoever might be the treasurer of the club, upon instruments made payable to the treasurer. Such a capacity to maintain an action can be conferred by a charter only."

In such a case, the members of the society are the proper parties to bring suit.[1]

§ 95. **Suits on behalf of members, as such.** In the absence of statutory regulation permitting an unincorporated society to sue or be sued in the name by which it is commonly designated, the members must sue or be sued as partners, or persons jointly interested. The court will not permit them to sue or be sued in the character of a society, nor will courts of equity, lend their aid to petitioners coming before them in such a character. It is the exclusive prerogative of government to create corporations, and to invest them with power to sue, as such, by their corporate name; and upon principles of policy, the courts of the country do not sit to determine upon charters granted by persons, who have not the prerogative to grant charters.[2]

In Lloyd v. Loaring, 6 Vesey Jr. 773, Lloyd and two other persons, "on behalf of themselves and all other members of the Caledonian Lodge of Free Masons, except the defendant, Loaring," brought their bill to obtain certain chattels belonging to the lodge. On demurrer to the bill for want of parties, Lord Eldon declined to hear argument in support of the demurrer, and, in allowing it, in the course of his opinion, said: "How is this court to take notice of these persons as a society? A bill might be filed for a chattel, the plaintiffs stating themselves to be jointly interested with several other persons, but it would be very dangerous to take notice of

[1] Ewing v. Medlock, 5 Porter (Ala.) 82; Piggott v. Thompson, 3 Bos. and Pull. Repts. 146.

[2] Story's Eq. Pl. at section 497.

them as a society, having anything of constitution in it. * * * It is the absolute duty of courts of justice, not to permit persons not incorporated to effect to treat themselves as incorporated on the record. * * * * I desire my ground to be understood distinctly. I do not think the court ought to permit persons who can only sue as partners, to sue in a corporate character, and that is the effect of this bill."[1]

Where a suit in chancery was brought in the names of "Jonah Pipe and William H. Humphreys, who sue in behalf of themselves, and many other persons too numerous to bring before the court, constituting the members of the British Emigrant Mutual Aid Society," it was held that the petitioners were not entitled to relief in the character in which they sued; that a mere voluntary society, without franchises, could not sue in the character of a society possessing corporate rights, and that the bill must be dismissed for want of proper parties.[2]

§ 96. Injunction restraining libel on society. An injunction will be granted upon an interlocutory application to restrain the publication of matter tending to injure a friendly society.

An honorary member of a friendly society having for its object the assurance of sums of money to defray the expenses of the funeral of deceased members, etc., issued a circular amongst the clergymen of the parishes, in which the society had district lodges, stating in the circular, matters which were false at the time of framing and issuing the circular, and were calculated to injure the business interests of the society. Upon motion, in an action by the trustees of the society against the honorary member, an injunction was granted restraining the issue of the circular until the trial of the action.[3]

§ 97. Judgment against unincorporated society. Where a society is proceeded against by *mandamus*, or kindred action, by a name not inappropriate as a corporate designation, and the application is resisted by it in that name, and no

[1] See Cullen v. The Duke of Queensbury, 1 Brown's Chancery Cases 101; Pearce v. Piper, 17 Vesey 1; Cockburn v. Thompson, 16 Vesey 321; Beaumont v. Meredith, 2 Ves & Beames 180.

[2] Pipe v. Bateman *et al.* 1 Iowa 369.

[3] Hill v. Hart-Davis, 47 L. T. R N. S. 82.

denial of its corporate character is contained in the papers, it will be presumed that it is in fact a corporation.[1]

But if the society is in fact an unincorporated society, in the absence of statutory regulation, a judgment against it will be null and void. Such a judgment is not a recovery against any person, either natural or artificial. The sale on execution on such a judgment, of property held in the name of the society, would be a nullity.

Where suit is brought against a member of an unincorporated society, he may not plead former recovery in an action against the society, under the name by which it is commonly designated. The society, having no legal existence, could not represent its members in a suit against it, and, as the member was not a party to the proceeding, such a plea would constitute no defense.[2]

[1] Doyle v. Benevolent Society, 3 Hun (N. Y.) 361; Barbaro v. Occidental Grove, 4 Mo. App. 429; United States Express Company v. Bedbury, 34 Ill. 459; Stoddard v. Onondago Conference, 12 Barb. (N. Y.) 570.

[2] Ash v. Guie, 97 Pa. St. 493.

CHAPTER V.

Liability of Members.

Sec. 98. For debts of incorporated society.
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Sec. 114. Liability of members in Pennsylvania.
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Sec. 98. For debts of incorporated society. Where a society is incorporated under the laws of a state, the liability of its members, for the debts of the society, is governed by the provisions of the act under which it is duly incorporated. But if the organic law of the society makes no mention of such liability on the part of its members, then such liability is governed by the general laws of the state upon the subject of corporations.

The trustees of an incorporated mutual benefit society are not personally liable for the debts of the corporation, unless they have in some way specially rendered themselves liable therefor.[1]

It is well settled that, where an association which has existed as a mere copartnership, becomes incorporated, and the corporation then accepts an assignment of all the property of such association, for the purpose of carrying out their object, the members are primarily, and jointly and severally liable for all the debts incurred before the act of incorporation. In such a case,

[1] Wolf v. Schleiffer, 2 Brewster (Pa.) 563.

the responsibility of the corporation for debts previously made with the association, does not become substituted so as to exempt the members from individual liability. And it does not change the case, that the members of the company had it in view to procure a future act of incorporation, when it was first formed.[1]

A man belonged to an incorporated mutual aid society to which he paid certain moneys. These moneys, according to the scheme of the society, were to be paid out again to the various members. Thinking that he had received no consideration for these payments, he afterwards brought an action as for money had and received, and sued two of the members jointly with the society. The declaration set out various fraudulent representations whereby plaintiff was induced to make the contract, but its only ground of action was the legal invalidity of the company's promise, the asserted want of corporate power to make the contract of membership according to such scheme. The court below held he had no cause of action, because the contract on its face, and the evidence which he put in, so far identified the plaintiff with the scheme as to prevent him from then complaining of it, as any worse than he had reason to believe it. The supreme court says: "He has joined two separate individuals with the company as having received money to his use. As the ground of action is based on the company's reception of money without consideration, and as by the terms of his contract all money was to be paid over to the company and distributed among the various subscribers, there is no joint liability asserted or made out. Bidwell and French (the members sued) had no joint functions as receivers of money, and most of it was not paid to either. Whatever either or both may have done, they have never held money jointly with the company or with each other. The action is entirely misconceived. It is also apparent from plaintiff's showing that whatever money he paid over was expected to be paid out to other persons and not to be retained, and it is not obvious how this particular action will lie for money which has been disposed of by his consent.

We need not, therefore, consider whether he is cut off by his own fault from complaining in any shape for the wrong which he supposes was done him. He cannot recover in this particular action."[2]

[1] Angell and Ames on Corporations at sections 592, 593, 594; Boyles v. McCoy, 37 Tenn. (5 Sneed) 602.

[2] Murphy v. Bidwell, *et al.* 52 Mich. 487.

§ 99. Where attempted incorporation is invalid. Articles of incorporation of a mutual benefit society were duly executed by defendants, and duly recorded with the register of deeds and secretary of state. A member of the society paid his dues, and received a certificate of membership. He received bodily injury entitling him, *as such member*, to pecuniary benefit, and an action was brought against the original signers of the articles of association as individual persons. The society did not become a corporation *de jure*, not having complied with the statute so as to become an insurance corporation *de jure*, and not being a "benevolent society" under the statute. In deciding that the action would not lie against the defendants as individual persons, the court said: "But notwithstanding it is not a corporation *de jure*, we think it must, at least, as between its members, be regarded as a corporation *de facto*. It is manifest that the understanding between the members, and the basis upon which certificates of membership were issued, was that the association was a corporation in fact as it was in form. [1]

It never could have been intended or expected that the members of the association, whether original founders—members, like defendant, or those who should become members by joining at any time, should or would be liable as individuals, either jointly or severally, to any particular member who should, by virtue of and under the terms of his membership, become entitled to pecuniary relief or benefit. On the contrary, the intention and real contract was that the association, as a corporation in the contemplation of the parties, *i. e.*, the members, should be liable and the association only. In such a state of facts, though the association is not a corporation *de jure*, and perhaps not for every purpose a corporation *de facto*, it is, as between the members themselves, to be treated as a corporation *de facto*, for that is the way in which the contract of the parties treats it; and the right of a member to pecuniary benefit from the association by virtue of his membership, must stand upon the basis that it is a corporation *de facto*. Being presumed to know the significance of his membership, its rights and liabilities, he is estopped to take any other position. This is not only intrinsically just and fair, but it is in accordance with the principles of the authorities. [2]

[1] Morawetz. Priv. Corp. § 139.

[2] Citing Morawetz Priv. Corp §§. 131, 132, 134, 137; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75, followed in 57, 64, 67 N. Y., and 95 U. S; White v. Ross, 4 Abb. Dec. 589; Aspinwall v. Sacchi, 57 N. Y. 331; Sanger v. Upton, 91 U. S. 56; Chubb v. Upton 95 U. S. 665.

It is important to bear in mind that no fraud is alleged against defendant; and, further, that this is a case in which a member of the association is seeking relief by virtue of his membership. If the action were between a purported or pretended corporation, which was wholly unauthorized and invalid, and a stranger, different rules and principles might, in some circumstances, be involved." [1]

§ 100. For debts of unincorporated society. In the absence of statutory regulations, the liability of the members respectively for contracts made by an unincorporated society, or its committee or trustees, depends upon the principles of the law of agency. In determining the liability of a member of such a society, the question is, whether the person by whose act the obligation was contracted, was the authorized agent in doing so, of such member. The leading case in England is Flemyng v. Hector, 2 Mees. & W., 172; 2 Gale, 180. In this case defendants were sued for wines supplied, before its dissolution, to the club of which they were members. The rules of the club provided for an entrance fee and an annual subscription; and those who failed to pay the subscription ceased to be members. The rules also provided that a committee should "manage the affairs of the club," and that members should daily discharge their bills due the club. The main ground upon which the decision rested was that the plaintiff could not recover unless he showed that the contract upon which he sued was made by a person authorized to contract on behalf of the defendant. The question was, as Baron Parke observed, whether there was sufficient evidence to go to the jury to satisfy them that the person who actually ordered the goods was the authorized agent of the defendant in making the contract.

In Todd v. Emly, 7 Mees & W., 427; 8 Mees & W., 505, the evidence was that a club was formed, and a fund subscribed which was to be administered by a committee. It was held that the committee must be supposed to have agreed to do that which the subscribers to the club had power themselves to do, that was, to administer the fund so far as it went, and not to deal on credit, except for such articles as it might

[1] Foster v. Moulton, 35 Minn. 458; 29 N. W. Rep. 155. An association, which does business under an unsuccessful attempt to incorporate, is, as to third persons, a partnership, composed not only of the directors, but of the subscribers to the articles; Field on Corp., sections 178 - 179. Coleman v. Coleman, 78 Ind. 344.

be immediately necessary for them to have dealt for on credit. There being no other evidence to connect the transaction with the defendants than that they were members of the general body of the committee, the question for the jury was, not whether defendants, by their course of dealing, had held themselves out as personally responsible to the plaintiff, but whether they had individually authorized the making of the contract in the ordering of the wine.[1]

In the application of these principles it has been held that a general rule, vesting the conduct of all the concerns of the club in a committee, does not authorize the committee to raise money by debentures, or otherwise to pledge the credit of members. *In re* St. James Club, it was said: "It is very clearly settled that no member of a club is liable to creditors of a club, except so far as by contract or dealing he may have made himself personally liable; and this is mere common sense, for, if a member paying his annual subscription and paying for the articles which he orders in the club, was also liable to pay the person who supplied the club with those articles, who would belong to a club?"[2]

Sundry persons raised by voluntary subscription among themselves a sum of money to erect a building for an academy, and then held a meeting, at which they chose one of their number an agent "to employ workmen, procure materials," etc.. and this agent hired the plaintiff to labor in the erection of the building. It was held that he bound all the subscribers, including himself, and that an action might be maintained against all the subscribers jointly.[3]

§ 101. Same subject continued. All the members of an unincorporated society who assent to an undertaking whereby a debt is incurred, or who subsequently ratify it, are liable for the payment of the debt.[4] Subsequent ratification is equivalent to prior authorization of the acts of an agent. No new consideration is necessary to support it.[5]

There are, doubtless, cases in which the act done by the officer or committee of the society, is so clearly in furtherance of the objects for which the association was organized that all the members will be presumptively bound by it. Whether

[1] See 4 Abbott's New Cases, p. 300.

[2] *In re* St. James Club, 13 Eng. L. & Eq., 589; 16 Jur., 1075.

[3] Robinson v. Robinson, 10 Maine, 240.

[4] Ash v. Guie, 97 Pa. St. 493; Ridgely v. Dobson, 3 Watt's & Sar. (Pa.) 118; Lewis v. Tilton, 64 Iowa 220; Richmond v. Judy, 6 Mo. App. 465.

[5] Ferris v. Thaw *et al* 72 Mo. 446.

the liability of the members for such act is to be presumed, must be determined by the court from an inspection of the articles of association. But when such is not the case, consent or ratification must be proved. It is for the jury to say whether the debt was contracted by the society with the previous concurrence or subsequent approbation of the defendant.

So far as the evidence of agency goes, a course of dealing may amount to proof of original authority. The fact that a member of a society recognized as correct a bill against the society for work and labor done, goes to show that he knew that the work was being ordered in the name of the society. The evidence of ratification, even though doubtful, and susceptible of different interpretations, is properly submitted to a jury; and slight circumstances and small matters are sometimes sufficient to raise a presumption of ratification.[1] Where a club is formed for the purpose of buying goods at wholesale prices out of paid-up subscriptions, in order to enable members to obtain the benefit of the lower prices of such goods, members are not liable for goods purchased on credit by an officer not authorized to contract on credit.[2] But where the contract of association and the agreed basis of making such purchases show that the officer is clothed with a discretion to contract on credit for the benefit of the society, the members are liable for such contracts made by the officer.[3]

Under a by-law of a society giving certain powers to a standing committee, and power "generally to manage the business of the society, expending only such sums of money as the society shall place at their disposal," the committee cannot bind the members of the society to pay debts which it may contract, unless such members consent to or approve the incurring of such debts.[4]

A member of an unincorporated voluntary society is not liable for a debt incurred by a committee of the society, if it does not appear that the member was present at the meeting appointing the committee, and there is no evidence of the authority of the committee to incur the debt, or of the obligations and duties of the members of the society.[5]

[1] Richmond v. Judy, 6 Mo. App. 465.

[2] Wood v. Finch, 2 F. & F. 447.

[3] Cockerell v. Ancompte, 40 Eng. L. & Eq. 284; 3 Jur. N. S. 844.

[4] Child v. Christian Society, etc., Mass. 11 N. E. Rep. 664.

[5] Volger v. Ray, 131 Mass., 439.

§ 102. Same subject continued. If an officer who has been authorized by the members of an unincorporated society to execute a promissory note for a debt of the society, executes it in his own name, the members of the society may be sued on the note, whether the officer discloses his agency or not, unless it is clear that both parties to the note intended that the officer alone should be liable. Parol evidence is admissible to establish the intention of the parties, as this evidence does not contradict that which is written, but only serves to show that others than those mentioned on the face of the paper are bound also, since the act of the agent is that of his principal. The liability of the principal depends on the act done, and not merely on the form in which such act finds expression.[1]

Where certain persons are, by an unincorporated society, appointed the "trustees of its property and effects," they are the general agents of the members for the management and control of its property and effects. They do not, as a matter of law, stand in the relation of principals to other agents appointed by the society to perform some particular duty in respect to such property, nor are they liable for any debt incurred for its improvement, except such as may have been made at their request, either express or implied.[2]

There is no legal distinction in respect to liability for the debts of an unincorporated society, between an officer and a mere member, where neither contracted the debt or authorized another to represent him in the transaction.[3]

It is not necessary that the agency of the person who incurs the debt should be evidenced by any minutes of the meetings of the members of an unincorporated society. There is no adjudication which requires such a verification of the joint acts of the members or a part of such members, but many cases have arisen in which such a doctrine might have been held, if it had been the law. There is, undoubtedly, much convenience in the making and preservation of minutes of proceedings in such societies, but the acts of the members may be shown in the delegation or ratification of power to a third person to incur debts on their behalf. The subsequent acts of members in the ratification of the acts of a third person in incurring debts on behalf of the society, may be shown to bind him.

[1] Ferris v. Thaw, 72 Mo., 446; Story on Agency, §§ 160, 270; Burls v. Smith, 7 Bing, 705.

[2] Devoss v. Gray, 22 Ohio St., 159,

[3] Central City, etc. v. Walker, 66 (N. Y.) 424; Wolf *et al.*, v. Schleiffer, 2 Brewster (Pa.), 563.

In an action against the members of an unincorporated society for work and material furnished in fitting up the room in which the society held its meetings, parol evidence that the defendants, at one of the meetings, passed a vote authorizing one of the members to procure the work and materials, which he afterwards ordered of plaintiff, is competent to show that the other defendants were jointly liable with him; and the fact that one of the defendants, who acted as clerk of the meeting at which such vote was passed, had since destroyed the informal minutes which he had taken for the purpose of preparing a record, does not preclude the plaintiff from showing that such a vote was passed, and that defendants participated in it or assented to it.[1]

In Lindley on Partnership vol. 1, p. 57, it is said. "No partnership or quasi-partnership subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners. Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members as such liable for each other's acts. * * * * It is a mere abuse of words to call such associations partnerships, and if liabilities are to be fastened on any of their members, it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association."[2]

"Upon the ground that there is neither community of profit nor community of loss, it has been held that no partnership subsists between the members of a mutual insurance society, in which each, in consideration of a payment made to him, underwrites a policy for a stipulated sum."[3]

In such societies, each member acts for himself only.

§ 103. Same subject continued. There is a rule of law which requires that all persons, to whom a trust is committed, must confer and act together, but this rule does not apply to agents appointed to perform ministerial duties.

Where the members of a society appoint a committee of two or more members to purchase property for the benefit of the society, it is not necessary that all the members of the

[1] Newell v. Borden, 128 Mass. 31.

[2] See Richmond v. Judy, 6 Mo. App. 465.

[3] See Strong v. Harvey, 3 Bing. 304; Redway v. Sweeting, L. R. 2 Exch. 400; Gray v. Pearson, L. R. 5 C. P. 568; Andrews and Alexander's case, 8 Eq. 176.

committee should be corporeally present when the purchase is negotiated and made, in order that such members of the society shall be personally liable for the act. The duty in such case is strictly ministerial; and ministerial officers may, in general, depute their powers to one another or to a third person.[1]

§ **104. Same subject continued.** The members of an unincorporated society are not liable to an action at law by the father of a deceased member, by reason of a provision in their constitution that "in case of the death of a brother, there shall be allowed from the lodge a sum of not less than thirty dollars, to defray the expense of burial; which shall be paid over without delay to the deceased brother's nearest of kin." The court says: "The constitution and by-laws of the lodge, treating them as articles of a voluntary association, do not amount to a promise to each member by all the rest, to pay him anything. The stipulation in the by-laws is, that, on the death of each member, there shall be allowed from the lodge a sum not less than thirty dollars, to defray the expense of burial, to be paid without delay to the deceased's nearest of kin. The payment is for that purpose. It is, if any promise at all, a promise by each member to contribute, by periodical and other payments, toward a certain fund, for all the purposes contemplated by the association, including money to be paid promptly for the expenses of burial, to be done usually before letters testamentary, in case of a will, or letters of administration, in case of intestacy, can be regularly issued. In other words, the promise of each member is to pay money to the lodge; and the lodge, not being incorporated, can maintain no suit. If it creates any right which can be recognized by law, it is an equitable right only to a share in a common fund, raised either for purposes purely charitable, or for their joint benefit, and can only be enforced in equity. And if there were any ground for such equitable relief, as in case of partners in a joint fund, raised for a special purpose, of which we give no intimation, such equitable relief could be sought only by a member or his legal representative.

But supposing this stipulation in the constitution and by-laws of the lodge, to amount to an express promise to pay thirty dollars upon a certain contingency, there is no consid-

[1] Wells v. Gates, 18 Barb (N. Y.) 554; Downing v. Rugar, 21 Wend, (N. Y.) 178.

eration for such promise moving from the plaintiff to the defendant, or from any person acting in privity with him or acting for his use or benefit, or with an intent and purpose to obtain a benefit to the plaintiff. There is no ground to infer, from the facts agreed, that the son, who was a member of the lodge, in paying his contributions thereto, had any purpose of obtaining money from the lodge, in case of his death, for the use of his father, or other next of kin, for his own benefit; to whomsoever it might be paid, under these provisions it was a naked trust, for defraying the charges of his burial. It is, therefore, not at all analogous to the case where A owes B and B owes C, and in consideration that B will release A, he promises to pay C. Such promise is valid, and C may sue A upon it. The reason is, that although the consideration for A's promise to C does not move from C, it moves from A for C's use and benefit."[1]

In Barry v. Nuckolls, 21 Tenn. (2 Hump.) 324, the proof showed that some young men organized a society for acting plays, and that they rented a house for that purpose, and agreed to pay the landlord six dollars a month rent for every month they should so occupy it. Barry became a member of the society some months after the contract. The court was requested to charge the jury, that if the contract was made before Barry became a member of the society he was not bound by it. This the court refused, and charged that in such a case he would not be bound for the previous, but would be for the subsequent rent, and the jury found accordingly. This was erroneous under the state of the pleadings. If Barry was liable at all for the rent after he became a member of the society, it was not upon a count framed upon the contract originally made, nor upon an *indebitatus* or *quantum meruit* count for work and labor done, but upon a count for use and occupation.[2]

§ 105. Liability of persons incurring the debt. An unincorporated society cannot be a party to a contract, nor to an action at law. The persons contracting in the name of such an organization are themselves personally liable, either as being themselves in fact principals, or as holding themselves out as agents for a principal which has in law no existence. They are liable for debts contracted by them in the name of such society with a stranger, in the absence of

[1] Payne v. Snow *et. al.* 12 Cush. (Mass.) 443.

[2] See Cohn v. Borst, 36 Hun (N. Y.) 562.

any agreement or understanding of the parties to the contract, that they shall not be personally liable for such debts.[1]

It is a general principle that, although a party may be a mere agent, and known to be such, yet if he contracts in his own name, or in his name as agent, when his principal is incapable of contracting, or is irresponsible, the law presumes that he intended to bind himself.[2]

The justice of this rule rests on the principle that otherwise the party performing the service would be remediless. If the agent, in such case, would stand exonerated, he must disclose a responsible principal, or, by contract, exempt himself from personal liability.

It is not necessary that the person incurring the debt for the benefit of an unincorporated society should know and believe, at the time, that he is incurring a personal liability or indebtedness. Nor does it alter the question, that he, at the time, contracted *as an officer* of the society. His liability springs from the fact that he had no principal, no legal association or body which he could represent, act for, or bind, and he must be held, in such a transaction, at least as against a stranger, to have represented, acted for, and bound only himself, in the same manner and to the same extent as if there had been no assumed authority to act for such society.[3]

Where a person contracts a debt for such a society, and as an officer thereof, the termination of the term of his office does not relieve him from liability. Having contracted the debt, he is bound to pay it, and his successor in office is not a successor in that sense that renders him liable on the contracts of his predecessor.[4]

§ 106. Same subject continued. In Cullen v. Duke of Queensberry, 1 Brown, Ch. 101, it was held that where the committee of a voluntary society entered, as such, into a contract for business to be done on behalf of the society, the funds proving insufficient, all the acting committee were personally answerable, on the ground that the credit must fairly be presumed to have been given to them rather than to the subscribers at large.

Where four members of an unincorporated church society signed a call to a pastor, agreeing to pay him one thousand

[1] Lewis v. Tilton, 64 Iowa, 220; Heath v. Goslin, 80 Mo., 310; Doubleday v. Muskett, 7 Bing., 110; Blakely v. Bennecke, 59 Mo., 193.

[2] Story on Agency, §§ 281, 282.

[3] Fredenthal v. Taylor, 26 Wis., 286; Blakely v. Bennecke, 59 Mo., 193.

[4] Sizer v. Daniels, 66 Barb. (N. Y.), 427.

dollars per year for his services, and he accepted the call, and performed the services as pastor of the church, the signers of the call were held personally liable for the promised salary.[1]

A committee appointed by an unincorporated society to make arrangements for a public exhibition, are individually liable for work necessary for the occasion, which a sub-committee of their number procure to be done, although in making the contract the sub-committee assumed to act as officers of the association.[2]

Such a rule is salutary, and tends to the promotion of justice, by preventing the procurement of services from too incautious laborers, and of goods from too confiding merchants, by putting forward an irresponsible committee to act for an irresponsible public gathering.

Where a person expressly permitted his name to be used as a member of a committee of arrangements for a ball to be given by an association, and subscribed to some of the preliminary expenses, but took no further part, and did not attend the ball, it was held that he was not liable for the cost of a supper provided for the occasion without his knowledge or consent.[3]

In an action against a person who has incurred a debt on behalf of the society, it is always competent for him to show that the debt was contracted on the credit of the funds of the society, and not on a footing of his personal liability. If the plaintiff, by his contract, has trusted solely to the state of the funds, and this has been shown, the member acting on behalf of the society, is not liable unless the funds have been collected.

In the case of simple contracts where the party has looked to the anticipated realization of funds by projectors of a particular undertaking, and not to the personal liability of the parties with whom he has contracted, his claim is confined to the fund, and he cannot enforce payment from individuals; and if the project miscarries, and funds are not realized, he has no claim upon anybody or for anything.[4]

§ 107. Where debt is incurred, payable out of the funds of the society. Where a contract is made between members of a society and a third person, by which the

[1] Thompson v. Garrison, 22 Kan., 766.

[2] Fredendall v. Taylor, 23 Wis. 540; McCartee v. Chambers, 6 Wend. (N. Y.) 649.

[3] Downing v. Mann, 3 E. D. Smith's Rep. (N. Y.) 36.

[4] 1 Addison on Contracts p. 289 * 186 Abbott's notes.

members agree to pay a certain sum out of the funds of the society, when they shall have funds applicable to his demand, the conditional contract becomes absolute, and an action may be maintained against the members, so soon as they receive such funds in the society.[1]

When an association consists merely of subscribers to a fund for a common object, and is not a partnership, it is competent for the members of the association to contract expressly on the credit of such fund; and to limit their liability to the amount of such fund, which may be applicable to the particular debt.[2]

But when an association which is, under its rules and scheme, a partnership, executes a note containing a promise to pay "out of their joint funds, according to their articles of association," the members are personally liable unless it appear unequivocally plain that the payee, knowing the force and effect of such a stipulation, agreed to look solely to the partnership fund for payment.[3]

Partners are personally liable for the debts of the partnership, and the limitation of their liability is viewed with disfavor by the law, both on account of the opportunity afforded by such limitation for fraud upon unsuspecting persons, and because such limitation seeks to give to partnerships the exemption and shield of corporations.

§ 108. Notice to creditors of withdrawal from the society. Where a body of men associate themselves for social intercourse and pleasure, and assume a name under which they commence to incur liabilities, by opening an account, they become jointly liable for any indebtedness thus incurred; and if either of them wishes to avoid his personal responsibility by withdrawal from the body, it is his duty to notify the creditors of such withdrawal; otherwise, if a creditor continues to furnish, in good faith, articles such as have been previously purchased for the use of the society, his responsibility will continue, upon the same principle that holds retiring partners to liabilities for an indebtedness subsequently contracted with former creditors.[4] And the fact that a member moves away from the town or city in which the society meets and has

[1] Higgins v. Hopkins, 3 Exch. 162.

[2] Landman v. Entwistle, 7 Exch. 632.

[3] Hess *et al.* v. Werts, 4 Sar. & Rawle (Pa.) 356.

[4] Park v. Spaulding, 10 Hun 128; Tenney *et al.* v. N. E. Protection Union, 37 Vt. 64.

property, is not of itself an abandonment of membership and a notice of withdrawal. [1]

In Park v. Spaulding, 10 Hun (N. Y.) 128, defendant was a member of the club at the time the account was first opened with the plaintiffs. He was one of the committee who made the first purchase of the plaintiffs, and he never notified plaintiffs at any time of his withdrawal from the club. The goods thus purchased were sent to the club-house, and came into the possession of the steward, who subsequently paid the plaintiffs the amount of that bill. He thereafter continued, as such steward, to act in making purchases from time to time in the name of the club; and, although a private arrangement existed by which the steward had agreed to make these purchases himself, and to furnish the articles to the members of the club on his own account, yet this arrangement was never communicated to the plaintiffs. Upon these facts the defendant was held liable for the debts contracted by the steward in the name of the club.

§ 109. Actions for libel and slander—privileged communications, etc. All communications by members of corporate bodies, churches and other voluntary societies, addressed to the body or any official thereof, and stating facts which, if true, it is proper should be thus communicated, are privileged. They are not absolutely privileged, so that no action will lie, even though it be averred that the injurious publication was both false and malicious, but are conditionally privileged to this extent: that the circumstances are held to preclude any presumption of malice, but still leave the party responsible, if both falsehood and malice are affirmatively shown. [2]

Words spoken or written in the regular course of church discipline, or before a tribunal of a religious society to or of members of the church or society, are, as among the members themselves, privileged communications and not actionable without express malice. [3]

Among the powers and privileges established by long and immemorial usage, churches have authority to deal with their members for immoral and scandalous conduct, and for that

[1] Tenney *et al.* v. N. E. Protection Union, 37 Vt. 64.

[2] Cooley on Torts, pg. 211-215; Van Wyck v. Aspinwall, 17 N. Y. 190.

[3] Hilliard on Torts, 355. Lucas v. Case, 9 Bush, (Ky.) 297; Kershaw v. Bailey, 1 Exch. (Eng.) 743.

purpose to hear complaints, to take evidence and to decide; and upon conviction, to administer proper punishment by way of rebuke, censure, suspension and excommunication. To this jurisdiction every member, by entering into the church covenant, submits, and he is bound by his consent. [1]

When a vote of excommunication from a church has been passed, and the offender thereby declared to be no longer a member, the sentence may, nevertheless be promulgated, by being read in the presence of the congregation. [2]

Where an incorporated society has no jurisdiction to expel a member upon a certain charge which has been preferred against him, its proceedings in such a case are *coram non judice*; and, if the charge made against the member is libelous under ordinary circumstances, a resolution adopted and entered in the minutes of the proceedings, expelling the member for such cause, is a libel, and the member introducing it is liable to an action. [3]

§ 110. Privileged communications and publications. Where a report is made by a subordinate lodge to the grand lodge of the order, in accordance with the usual rules, regulations and customs of the order, by a member of a special committee thereof, to which was referred a petition respecting the expulsion of a member of the order from a subordinate lodge, justifying the subordinate lodge in expelling the member for perjury, and setting forth that the officers of the subordinate lodge were unanimously of the opinion that the statements sworn to by such member in a petition presented by him to the grand lodge, were all infamously untrue; is received and adopted by the lodge in the usual course of its business, and thereafter is printed and published in a pamphlet entitled "The Grand Lodge Journal of 1873," in connection with the general and ordinary transactions of the lodge, and in the usual manner of printing and publishing the journal of the records and proceedings of the lodge, for the use of the members of the order, such publication is *prima facie* privileged. In such a case the occasion and manner of the publication prevent the inference of malice, which the law draws from un-

[1] Remington v. Congdon, 2 Pick. (Mass.) 310-315; O'Donaghue v. Mc Govern, 23 Wend (N. Y.) 26; Servatius v. Pichel, 34 Wis. 292; Shurtleff v. Stevens, 51 Vt. 501; 31 Am. Repts. 698–note.

[2] Farnsworth v. Storrs, 5 Cush. (Mass.) 412.

[3] Fawcett v. Charles, 13 Wend. (N. Y.) 474.

authorized communications, and afford a qualified defense, depending upon the absence of actual malice.

In such a case, where the publishing is conditionally privileged, and where the circumstances of such publication are such as to repel the inference of malice, and exclude any liability of the defendant unless upon proof of actual malice, the burden of proof upon the trial, as to whether the defendant was actuated by actual malice, is upon the plaintiff. If the plaintiff gives no evidence of express malice, the defendant is entitled to a verdict.[1]

In an action for slander the defendant set up as a defense, that plaintiff and defendant were, at the time of the alleged publication, members of an association known as the Independent Order of Odd Fellows; that the acts charged in the alleged libel were violations of the laws of said order; and that the publication complained of was a presentment to the lodge, of which both parties were members, of the charges, for the purpose of having the truth thereof inquired into, and of having the plaintiff dealt with according to the laws of the order. The court said: "The law protects the defendant so far as not to impute malice to him from the mere fact of his having spoken words of the plaintiff, which are in themselves actionable, though he may not be able to prove the truth of his allegations. But the plaintiff will be able to sustain his action for slander if he can satisfy the jury by other proofs, that there was actual malice on the part of the defendant, and that he uttered the words for the mere purpose of defaming the plaintiff. * * * * The law simply requires that there should not be a want of common honesty in preferring the charge."[2]

It is stated in Addison on Torts: "Whether the circumstances under which a communication was made constitute a privileged communication or not, is a question which the court has assumed the jurisdiction of determining, but, if there is any dispute about these circumstances, the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communications, under whatever circumstances made, should be believed to be true by the party making them; for a person cannot shelter himself under privilege, if he believes the charge imputed untrue, unless he, at the same time, declares his belief in its untruth. If a man

[1] Kirkpatrick v. Eagle Lodge, etc., 26 Kan. 384.

[2] Streety v. Wood, 15 Barb. (N.Y.) 105.

knowingly makes a false charge, there is at once actual malice, and the privilege is blown to the winds."

§ **111. Same subject continued.** An action for slanderous words spoken of and concerning the plaintiff by an unincorporated mutual benefit society, of which he was a member when the alleged tort was committed, will not lie against the society sued as a partnership; but the redress, if any, is against the wrong-doers in their individual or non-partnership capacity. Nor does it make any difference in this respect, that in consequence of the slander, the plaintiff was suspended from the benefits of membership for a term of years, and that the action was brought pending this term of suspension.

In discussing this question the Supreme Court of Georgia says: "If, as the declaration alleges, the association was a partnership, the plaintiff was a member of it; and, after diligent search, we have been unable to discover any authority supporting the theory that a man can slander himself, either when he speaks directly as an individual, or when he speaks indirectly through a partnership of which he is a member. Upon principle, we do not see how he could charge the partnership assets with the damages that might be recovered, he having an interest in the assets as part owner of the same. Nor can we see how he can escape the general rule that, in an action at law against a partnership, all the partners, so far as the partnership assets are involved, must be defendants. That rule, applied to this case, would require the plaintiff to sue himself. The equity powers of the court cannot be invoked to overcome this obstacle, for a court of equity has not, nor ever had, jurisdiction to decree damages for defamation or slander."[1]

Where, by statute, suits are permitted by or against a treasurer of an unincorporated society, with like effect as if all the members are or were sued, "as regards the joint rights, property and effects" of such society, it is doubtful whether such statute covers a suit for libel published by a society, and whether it is not confined to the assertion of property rights, strictly so called.[2]

§ **112. Actions between members.** In determining the proper remedy of members of an unincorporated

[1] Gilbert v. Crystal Fountain Lodge, Ga., 4 S. E. Rep. 905.

[2] Duncan v. Jones, 32 Hun (N. Y.), 12; Rorke v. Russell, 2 Lansing (N.Y.), 244.

society against each other, it is necessary to inquire whether the rules and scheme of the society create a partnership or quasi partnership between the members. If the liabilities which the rules and scheme create are those in the nature of copartnership, the member must seek his remedy against his fellow-member under the law of partnership; and in all matters growing out of the relation of such membership, the only remedy is by bill in equity, or action of account.[1]

If an officer of the society order goods for the society from a fellow member, the solution of the question of the personal liability of the officer is not to be found by examining the cases with reference to the liability of officers and members in their dealings with third persons, but by looking at the rules of the society to see what are the liabilities which they create. If it be found that, by becoming a member, the seller did not lose his right of action against any other member for goods sold, although they were bought for the purposes of the society, he may sue the purchaser and those consenting to or approving the purchase; and the only question that can then arise in the case is, whether the seller contracted to supply the goods on the credit of the purchasers, or whether he looked to the funds of the society for payment; and this is a question of fact for the jury to determine. These principles are clear, but the application of them to the facts in each individual case is exceedingly difficult.[2]

Where the person incurring the debt on behalf of the society and the person with whom the debt is incurred are both members of the same unincorporated voluntary society, and where the nature of the agency, and the extent of the powers of the representative of the society are known to the creditor, such representative or agent is not individually liable for the debt.

A member of a voluntary society formed for building a meeting-house, who is appointed one of the building committee, and acts as such in making contracts and procuring materials for the building, is not individually liable to pay for services for which he thus contracts with a member of such society, who knows his agency, and who knows that the contract is for the benefit of the society, and that it is entered into by him merely as such agent.[3]

[1] Niven v. Spickerman, 12 Johnson (N. Y.), 401.

[2] Caldicott v. Griffith, 22 Eng. L. and Eq., 527.

[3] Abbott v. Cobb, 17 Vt. 593.

In Cheeny *et al.* v. Clark, 3 Vt. 431, the court says: "The subscribers to the articles of agreement, not being constituted a society under the statute, with corporate powers, but being a mere voluntary association of individuals, the question is, whether the defendants who acted as their committee in superintending the building of the meeting-house, were personally answerable for the services performed by the plaintiff upon it. It does not appear that the defendants made any express promise, or pledged their individual credit and responsibility, so as thereby to impose a personal obligation upon themselves; nor does it appear that any moneys were in their hands, or that any funds remained at their disposal, to answer or pay for the services. They were appointed by the body of the subscribers to execute a mere trust; were bound to act under the direction and control of the subscribers, and liable to be removed at their pleasure; and it appears that one of them was in fact removed and another appointed in his place. The plaintiff was one of the subscribers by whom the defendants were appointed; and in the absence of any express contract or undertaking he can have no legal or equitable right to look to the personal security or liability of the defendants, and hold them answerable out of their private funds, for work done by him for the benefit of the subscribers generally. Indeed, as the subscribers to the articles of association were all equally interested in building the meeting-house, and the plaintiff and the defendants were members of the association, the case seems to fall within the rule, that one of several persons jointly concerned in a common purpose cannot maintain an action against all or any of the others for work and labor performed for their joint benefit. In Holmes v. Higgins, 1 Barn and Cres. 74, where a number of persons associated together for the purpose of obtaining an act of parliament and making a railway, and subscribed for shares of £50 each, it was held that they were partners in the undertaking, and that a subscriber, who acted as their surveyor, could not maintain an action for work done by him in character, against all or any of the subscribers."

§ 113. Actions between members continued. Where the defendant purchased a steamer, and had her repaired, in the expectation of selling her to an association of which he and the plaintiffs were, or were to be, members, he was held liable in an action at law to the plaintiffs, for such repairs, whether the vessel was sold to and employed by the association or not. But if the repairs were made by the plaintiffs upon

an agreement or understanding between the defendant and the plaintiffs, that the association was to pay, or that the plaintiffs should look to the association for payment, then he is not liable therefor in such an action.

Where the question is, on whose credit was the labor and materials, sued for, done and furnished, each party has the right to ask for instructions based on his view of the case, if the evidence relied on be legally sufficient to warrant the conclusion sought to be deduced from it. [1]

An action at law will not lie by one member, in his right of membership and as the assignee of other members, against a contractor with the association, who is also a member, upon his contract with the society. No member has an interest in the property and effects of the society, which can be separated and taken out of the whole for his sole use, until the joint affairs are settled, the society dissolved, the mutual rights of the members adjusted, and the ultimate share of each determined. In any agreement made by a contracting party with the association as such, and in any right of action arising thereon, each member has an interest, but no member has an interest which he can transfer, so that an action can be maintained by his assignee. In such an agreement the defendant member has as great an interest as any other member.

A court of equity, with all the parties before it, can grant appropriate relief in such cases.[2]

Where the constitution of an unincorporated society defined its object to be to stimulate a healthy interest in the breeding and management of pigeons and bantams, and to disseminate useful knowledge in relation thereto; gave the board of directors the charge and management of all public exhibitions of the society; and provided that each member should pay an initiation fee and an annual assessment; and the society held a public exhibition and awarded premiums, and the expenses, including premiums, were greater than the receipts, a bill in equity may be sustained by those members who paid the deficiency, against other members for contribution, if the defendants participated in a vote to give the exhibition with premiums, or if they assented to such vote.[3]

§ 114. Liabilities of members in Pennsylvania. In Pritchett v. Schafer, 2 Weekly Notes of Cases (Pa.) 317, it was

[1] Wells v. Turner, 16 Md. 133.
[2] McMahon v. Rauhr, 47 N. Y. 67.
[3] Ray v. Powers, 134 Mass. 22; See also Tyrrell v. Washburn, 88 Mass. 466.

held that members of an unincorporated mutual benefit society were jointly and severally liable to pay "sick benefits" to co-members, in the state of Pennsylvania, but the act of April 28, 1876, of that state, declares that members of beneficial societies "shall not be individually liable for the payment of periodical or funeral benefits or other liabilities of the lodge or other organizations," and provides that "the same shall be payable out of the treasury of such lodge or organization."

Notwithstanding the above act, such associations still continue to be partnerships. The act simply limits the remedy. It exonerates the members from all individual liability, and confines the execution to the partnership property. An action at law may be maintained against the members, but the remedy is limited.[1]

§ **115. Liability of members suspended by statute in New York.** The New York Code of Civil Procedure, at section 1919, provides that an action or special proceeding may be maintained against the president or treasurer of an unincorporated association, consisting of seven or more persons, upon any cause of action upon which the plaintiff may maintain such an action against all the associates by reason of their interest or ownership, either jointly or in common, on their liability therefor, either jointly or severally. Any partnership or other company of persons which has a president or treasurer is deemed an association within the meaning of this section.

When an unincorporated association, consisting of more than seven members, has been formed, and has adopted by-laws and elected a treasurer, an action cannot be maintained against the individual members thereof upon a debt due from the association, unless an action has first been brought against its president or treasurer, as prescribed by this section.[2]

[1] Kurz v. Eggert, 9 Weekly Notes of Cases 126.

[2] Flagg v. Swift *et al.*, 25 Hun (N. Y.) 623, criticising and distinguishing Park v. Spaulding 10 Hun 128; Witherhead v. Allen, 4 Abb. Ct. App. Dec. 628; See Tibbits v. Blood, 21 Barb 650, and Schmidt v. Gunther, 5 Daly 452.

CHAPTER VI.

Officers.

SEC. 116. }
SEC. 117. } Powers and duties.
SEC. 118. Liability of officers of mutual benefit society.
SEC. 119. Persons acting publicly as officers.
SEC. 120. Election.
SEC. 121. Officers holding over.
SEC. 122. Salaries, fees, commissions, etc.

Sec. 116. Powers and duties. In the absence of express provisions in the charter of a mutual benefit society, limiting the appointment of its officers and agents, or the scope of their duties and powers, it must be presumed that each person, in becoming a member of the society, impliedly consents that it shall be represented by such officers and agents as are reasonably necessary for the transaction of its business, and that they shall possess the powers, and perform the duties ordinarily possessed and performed by such officers and agents. While it is not competent for the officers and agents of a society to relieve an insured member from the payment of any assessments properly made against him, it is competent for them to mitigate the terms upon which his policy would be otherwise declared forfeited. In regard to regular insurance companies, it is well settled that the agents of the company may, by acts binding on the company, waive the causes of forfeiture declared in the policy, and there is no reason why the principle may not also apply to mutual benefit societies, where the waiver does not substantially impair the rights of creditors and policy holders.[1]

But where the charter or by-laws make it the imperative duty of its officers and agents to literally and rigorously enforce forfeitures for non-payment of assessments, on the day fixed, the members are each bound by such provisions.

[1] Protection Life, etc., v. Foote, 79 Ill. 361.

A member of a mutual benefit society represented, for the purpose of procuring insurance, that he was fifty-nine years old, when in fact he was sixty-four years of age. It was claimed, after his death, that the treasurer of the society, had received assessments after he had knowledge of the decedent's true age. The court held that the evidence failed to show that the treasurer had acquired any knowledge or information of the false representation while in the discharge of any official duty, and says: "But assuming that the treasurer acquired notice of the fact, when he received the assessments, he had no power to ratify the invalid contract. He could not admit a member, and thereby make a contract of insurance, and, if he had no power to make such a contract for the corporation, he had no power to validate a void contract by any act of ratification."[1]

§ 117. Powers and duties continued. As a general rule, an officer of a mutual benefit society has no authority to waive a strict compliance with the by-laws, on the part of a member. The society has power to establish by-laws, and it is the imperative duty of the member to comply with them. Where the rules of a society provided that its by-laws should in no case be altered, unless previous notice of such intended alteration be given, as prescribed therein, and it should be voted for by two-thirds of all the members present at that meeting, it was held that the president had no right in any case to suspend or change the by-laws by his verbal act, and at his pleasure, and that a member was chargeable with notice, that the president had no such right.[2]

The statement of the secretary of a mutual benefit society to the insured member, that he need not pay his dues until certain charges then pending against him were disposed of, is binding upon the society.[3]

Notice from the secretary of a society, whose duty it is to send such notices, is notice from the society, and it is bound by his acts.[4]

A mutual fire insurance society issued a policy to its treasurer on a house owned by him. The policy contained several conditions, but not all of the by-laws of the society. The treasurer afterwards sold the house and lot to the complainant,

[1] Swett v. Citizens' Mutual Relief Society. 78 Me. 541; 7 Atl. Rep. 364.

[2] Hale v. Mechanics' Mutual etc., 6 Gray 169; Baxter v. Mutual Ins. Co. 1 Allen 294.

[3] Jones *et al.* v. National Mutual Ben. Ass'n. Ky; 2 S W. Rep. 447.

[4] Olmstead v. Farmers' Mutual, etc., 50 Mich. 200.

and assigned the policy to him. The complainant, during the negotiations, asked the treasurer, in the presence and hearing of the secretary, whether the policy contained all the conditions of insurance. He replied that it did, and the secretary remained silent. After the house had burned, complainant brought an action at law on the policy, to which the society pleaded a by-law not mentioned in the policy. This by-law he had violated, and thereby forfeited all right of recovery.

It was held upon these facts that as the officers of a mutual insurance society could not waive its by-laws, the society was not estopped by the treasurer's declaration to the complainant, nor by the secretary's silence when such declaration was made.[1]

Where the trustees of a secret society are vested with general power to manage its property, a lease of the lodge room to another society for use one night in each week is not beyond their power, and is valid.[2]

Trustees *de facto* of a society, whether such society be incorporated or not, may maintain an action against a trespasser for an injury to the property of the society.[3]

§ 118. Liability of officers of mutual benefit society. It is the duty of the officers of a mutual benefit society to protect and properly disburse the funds that have been collected by assessments for the payment of death losses, and if the directors have divided among themselves and other incorporators, and paid out for expenses, any money which ought to be applied to the payment of a death loss, they are personally liable to the beneficiary for the amount misappropriated or misapplied, even though they acted in good faith in the matter.[4]

But officers of such a society, whose duties are executive, and who are subject to the direction and control of the directors, are not liable for such misappropriation of funds, if they have simply performed their duties as directed.

The officers of such a society are not liable for money of the society deposited in banks, and lost by its failure, if they acted, in reference to such deposit, in good faith, and as prudent men generally acted in the same community.[5]

[1] Miller v. Assurance Association, 42 N. J. Eq. 457; 7 Atl. Rep. 895.

[2] Phillip *et al.* v. Aurora Lodge, 87 Ind. 505

[3] Green v. Cady, 9 Wend. 414.

[4] Stewart v. Lee Mutual etc. Association, 64 Miss. 499; 1 Southern Rep. 743.

[5] Stewart v. Association, *supra*.

Trustees or officers of an unincorporated society are not individually liable for its debts, unless they have in some way specially rendered themselves liable.[1]

F. was elected "Master of Exchequer" of a lodge of Knights of Pythias in 1879, and annually thereafter until 1885. Although the constitution of this order required that this officer should give bond with security before entering upon the duties of his office, F. was not required to give bond until April 1884, when he executed the bond sued on.

This bond covenanted that he would render an account for all money or other property that should come, or had already come, to his hands, "or is now in his hands." At the time he executed the bond he owed the lodge from $400 to $500. He had placed the money in his business, but this fact was not known, either to the lodge, or to his sureties. When his successor was elected in 1885, he owed the lodge $880.17, and soon afterward paid $500.00.

An action was brought on the bond to recover the remainder.

The court held that F. was, at least, a *de facto* officer prior to the time he executed the bond, and the sureties could not rely upon his failure to execute bond as a defense as to the money that came into his hands during that time; that the amount which F. owed the lodge when the bond was executed was, in legal contemplation, "in his hands" within the meaning of the bond, although the money was invested in his business, and his sureties were liable therefor.[2]

§ 119. Persons acting publicly as officers. Persons acting publicly as officers of the society, are to be presumed rightfully in office.

If officers of an incorporated society openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.

§ 120. Election. Where the charter of a society authorizes the election of its "directors or managers at such time and place, in such manner, as may be specified in its by-

[1] Wolf *et al.* v. Schleiffer 2 Brews. 563.

[2] Wilson v. Wright, 8 Ky. Law Rep. 963 (Ky. Sup'r Ct.)

laws," a by-law authorizing its members to vote at all elections either in person or by proxy, is valid.

Where, at an election of directors of an incorporated mutual benefit society, the only objection made was as to the right of members to vote by proxy, it was held, on *quo warranto* proceedings against the directors elected, in the absence of proof that the persons executing the proxies were members of the society, or that the proxies were properly executed, that it would be presumed that the proxies were regular and proper.[1]

The common law required all votes to be given in person, and when that is a part of the law of the land, and there is no statute authorizing votes to be cast by proxy, the society may not make provisions for voting by proxy.[2]

But in State v. Tudor, 5 Day, 329, it is held that provisions of the by-laws of an incorporated society for voting by proxy, are matters of internal regulation and convenience, with which courts will not interfere, even though that mode of voting is not sanctioned by any statutory provision.

Where two elections for trustees of a religious incorporated society were held on the same day, one held before persons designated in the manner customary with the congregation, and held at the usual place, and the other at another place, the persons having a majority of votes at the election conducted at the usual place, and in the usual manner, are to be considered as duly elected over others voted for at a different place of election, though the persons holding the latter election were excluded from the usual place of election, and though the latter had a majority of all of the votes cast at both places of election.[3]

On the trial of a *quo warranto* proceeding in which the issue is on the legality of the election, evidence may be given of conversations and transactions, threats and confederacies of members, etc., previous to the election, if they were connected with, and might have had an influence on it.[4]

Where the charter gave to the society power "to make rules, by-laws and ordinances, and to do everything needful for the good government and support" of the society, it was held that the society had power to make a by-law vesting the appointment of inspectors of their elections in the president of

[1] People *ex rel.* v. Crossley, 69 Ill. 195.

[2] Taylor v. Griswold 2 Green (N. J.) 222.

[3] Juker v. Commonwealth, 20 Pa. St. 484.

[4] Commonwealth v. Woelper *et al.* 3 Sar. & R. (Pa.) 29.

the society, and to make a by-law prohibiting tickets from being counted at an election, which had other things on besides the names.

And it is a violation of such a by-law as last above mentioned, to have an eagle engraved on such tickets.[1]

When the mode of electing officers is not regulated by the charter, a corporation may make by-laws to regulate the election.[2]

Where an office in a society is not created or expressly authorized by state law, but is one created by an unincorporated society, and filled by election by a body which possesses no corporate powers or functions, the courts of the state have no authority whatever over the office, or over the election to it. These are controlled exclusively by such society, and the decisions of the society upon the legality, or the result of such elections, are final.

Such an office cannot be made the subject of *quo-warranto* proceedings.[3]

§ 121. Officers holding over. In every case of corporations created by statute, so far as the statute directs and provides, it must rule; but in cases pretermitted by the statute, there are numerous principles of common law which apply, and guide and sustain the corporation; and to ward off their application, it would be necessary for the legislature to use negative expressions, or such as would exclude those general rules of law. It is one of those general rules that if a corporation fails to elect officers on its corporate day or time, still the corporation does not cease; the old officers retain their powers, and may act until they are superseded by a new appointment. Such officers are subject to liability on their bonds as much after, as before the time for which they were elected expires, if they continue to act, and no subsequent election has taken place.[4]

§ 122. Salary, fees, commissions, etc. Where there is no agreement between the society and one of its officers, that the officer is to receive any salary for his services,

[1] Commonwealth v. Woelper *et al.*, 3 Sar. and R. (Pa.), 28.

[2] Newling v. Francis, 3 T. R., 189.

[3] Ter Vree v. Geerlings *et al.*, 55 Mich, 562.

[4] Weir v. Bush, 4 Littell (Ky.), 430; People v. Runkel, 9 John Rep., 147.

the right to such compensation must depend upon the usage in like cases.

Where an officer has not only made no charge against the society from time to time, as he has made reports to it of his stewardship, but has, as shown by the minutes of the proceedings, received the thanks of the society for his gratuitous and able management of the affairs under his control as such officer, it must be held that he may not charge the society for such services.[1]

Trustees of a society, having voted to themselves and accepted designated sums of money as compensation for their services for particular years, have no power, in subsequent years of their service, to vote themselves "back pay" for their services during such former years.

Such trustees have no authority, by virtue simply of their trusteeship, to act for, or bind their society, except in their aggregate and administrative capacity as a board; and where they assume, by virtue of their trusteeship, to act in the separate and individual capacity of treasurer, secretary, or as general or special agent of their association, they cannot thereby create against it a legal liability to compensate them as trustees for such services.

Such trustees, unless specially invested with the additional capacity and authority of officers or agents, are limited in their claims for compensation to such sums as will reasonably compensate them for the time and expense incurred in going to, attending and returning from, their official meetings, and for their services while in session.[2]

Trustees are charged with the duty of faithfully executing the trust which the laws and regulations impose on them. They are entitled to a reasonable compensation for the service rendered; but any plan or scheme by which money is collected from members by assessment or otherwise, with a view to their individual profit, and beyond what is necessary to defray the reasonable expenses of executing the trust, is a breach of trust.[3]

Where officers and directors of a mutual benefit society, engaged in the business of issuing wagering policies, have divided among themselves the surplus funds of the society as compensation for their own services, a decree may be entered against

[1] Vestry and Wardens v. Barksdale, 1 Strob. Eq. (S. Car.), 197.

[2] State *ex rel* v. Peoples' etc. Ass'n, 42 Ohio St., 579.

[3] State v. Standard Life Association, 38 Ohio St., 281.

the officers and directors jointly, in favor of a receiver appointed on dissolution of the company, for the amount of the funds fraudulently misappropriated.[1]

The salaries of officers of voluntary societies must not, especially when the officers fix the amount of their own salaries, be out of proportion to the amount of responsibility and labor devolving upon them. And where it is shown that the officers of the society seem to regulate their salaries rather by the condition of its expense fund than by the compensation actually earned, courts will, upon application, interfere to protect the interests of the members.[2]

[1] McCarty's Appeal, 17 Weekly Notes of Cases, 182.

[2] State *ex rel* v. Peoples' etc. Ass'n, 42 Ohio St., 597.

CHAPTER VII.

Meetings of the Society.

SEC. 123. Notice of meetings.
SEC. 124. Rules governing future meetings.
SEC. 125. It is the duty of members present to vote, etc.
SEC. 126. When quorum is presumed to have been present.
SEC. 127. When corporate acts are binding,
SEC. 128. Meetings on Sunday.

Sec. 123. Notice of meetings. If the charter or by-laws of a society fix the time and place at which regular meetings shall be held, no further notice to the members is necessary.

But where particular business of great importance and extraordinary character is to be brought before a regular meeting, notice of the meeting, and the particular object of it, should be given.

A notice of a special meeting must always be given. It should be given to the member in person, unless it is otherwise provided in the charter or by-laws.

A notice of a meeting should state specifically the time when, and the place where it will be held, and the particular business which will come before the meeting.

Where the charter or by-laws do not prescribe how long before a meeting a notice shall be served, it must be served a reasonable time before such meeting.

A notice of a special meeting of a society, which does not state the business to be transacted, does not authorize a vote to dissolve the association and dispose of its property.[1]

When a member of a society is present at a meeting, and participates in the proceedings he complains of, such proceedings not being improper in themselves, not subversive of the object for which the society was formed, he is estopped from objecting to the irregularity of the meeting and the insufficiency of the notice of it.[2]

[1] St. Mary's Ben. Ass'n. v. Lynch, N. H. 9 Atl. Rep. 98.

[2] Fischer v. Raab, *et al.* 57 How. Pr. 87; Hussey *et al.* v. Gallagher *et al.*, 61 Ga. 86.

Where the organic law, the charter, or the by-laws prescribe a form of notice, or the manner in which it shall be served, the notice must conform to these requirements. If it fails so to conform, the proceedings of a meeting held pursuant thereto, are invalid.[1]

All members of a society are presumed to know of the times appointed by the charter, constitution or by-laws, for the transaction of particular business; and, therefore, no special notice is required to be given of such meeting, or of the intention to transact such business. A society can transact any business at an adjourned meeting, which could have been done at the original meeting, the former being but a continuation of the latter. No new notice of the adjourned meeting is necessary.[2]

But if, at a regular meeting, notice is given that a special meeting has been called, notice of such meeting should be sent to the members, for there is no presumption that persons not present at a regular meeting knew what was done there.[3]

It is a presumption of law, that every meeting of a society was lawfully and regularly held, and that the proper notice of it had been given. It is for him who attacks the legality and validity of a meeting, to prove want of notice, or its insufficiency.[4]

§ 124. Rules governing future meetings of the society. An enactment made by one meeting of the society to govern the proceedings of future meetings, is inoperative beyond the pleasure of the society, acting by a majority vote at any regular meeting. The power of the society to enact its laws is continuous, residing in all regular meetings of the society so long as it exists. Any meeting can, by a majority vote, modify or repeal the law of a previous meeting, and no meeting can bind a subsequent one by irrepealable acts or rules of procedure. The power to enact is the power to repeal. A by-law requiring a two-thirds vote of members present to alter or amend the laws of the society, may itself be altered, amended, or repealed by the same power which enacts it.[5]

[1] Stevens v. Eden Meeting House Society, 12 Vt. 688.

[2] Warren v. Mower, 11 Vt 385; Scadding v. Lorant, 5 Eng. L & Eq. 16; Smith v. Law, 21 N. Y. 296.

[3] People v. Batchelor, 22 N. Y. 128.

[4] Society v. Weatherly, 75 Ala. 248; Porter v. Robinson. 30 Hun. 209.

[5] Com. v. Mayor of Lancaster, 5 Watts 152; Richardson v. Society, 58 N. H. 187.

§ 125. It is the duty of members present to vote. When the proper presiding officer of a society puts a question to a vote, it is the duty of every member to respond, or be counted with the greater number, because he is supposed to have assented beforehand to the process pre-established to ascertain the general will.

But the rule of implied assent is certainly inapplicable where the proceedings are revolutionary in their character, and the question is not put by the proper presiding officer.

The refusal of an appeal from the decision of the presiding officer is no ground for his degradation at the call of a minority; nor could it impose on the majority an obligation to vote on the question when put unofficially, and out of the usual course. In such a case, the rule of implied assent does not apply, and such a vote of degradation cannot be sustained by the constructive votes of those who remain silent.[1]

All persons present at a meeting at which a vote is taken, disposing of a fund of the society, if no one dissents, are considered as voting with the majority for the motion, and assenting thereto. Their right to the fund is concluded. But the rule is otherwise as to those not present.[2]

§ 126. When quorum presumed to have been present. Where it is not usual to mention on the minutes the names or number of those present, and the charter requires two-thirds to form a quorum, it will be presumed that the required two-thirds assembled, where it is stated on the minutes that, on due invitation, the members met.[3]

§ 127. When corporate acts are binding. In aggregate societies, the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the members of the society; the majority of the definite body must be present, and then a majority of the quorum must decide; but a majority of the members present may act.[4]

[1] Commonwealth v. Green, 4 Whart. (Pa.), 537-603.

[2] Abels v. McKeen, 18 N. J. Eq., 462; Richardson v. Society, 58 N.H. 187.

[3] Commonwealth v. Woelper *et al*, 3 Sar. & R., 28.

[4] 2 Kent, Com., 293.

When no special provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part, but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not. And, though a particular constitution require the presence of a majority of the whole number, yet the concurrence and consent of a majority of the whole is not necessary; it is sufficient that a majority of the number present concur. So, where a number less than the majority of the whole, are by a particular constitution competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of the majority of the whole.[1]

An incorporated society can only speak and act through the medium prescribed by law When the law prescribes this medium to be the board of directors, the society at large may not assume the management and direction of its affairs.

At a meeting of the members of an incorporated mutual benefit society, a resolution was passed directing a larger amount to be paid to certain beneficiaries than the amount of the respective assessments collected for their benefit. A by-law of the society provided that no money could be drawn or appropriated from the treasury without the order of the directors. The Supreme Court of California held that, in the absence of an adoption or ratification by the directors, the resolution was inoperative, as in that state an incorporated society could only act by its board of directors.[2]

§ **128. Meetings on Sunday.** In People v. Young Men's Father Mathew Benevolent Society, 65 Barb. (N. Y.) 357, a member was expelled from the society at a meeting held on Sunday evening—and the notice of charges and the meeting was also served on Sunday. He applied to be reinstated on the ground that the proceedings and notice were void. But the court held that, however objectionable it might be to hold business meetings of such a society on that day, it was not forbidden by statute of the State of New York, and, in the opinion, the court says: "The relator chose to belong to a society which held all its regular meetings on that day, and if, at such a meeting, he was served with a notice to attend the next meeting, it does not rest with him to make the objec-

[1] 2 Bacon's Abridgment, 459.
[2] *In re* La Solidarite Mut. Ben. Association, 68 Cal. 392.

tion. * * * * At the common law, judicial proceedings only, were prohibited on Sunday. Hence judicial proceedings on Sunday are void at common law. But all other business transactions are valid, except so far as prohibited by our statute." [1]

Speaking parenthetically of the fact disclosed by the record, that a member had been, on Sunday, expelled from a mutual benefit society consisting of Israelites only, the Supreme Court of Pennsylvania in The Society for the Visitation of the Sick v. Commonwealth *ex rel.* Max S. Meyer, 52 Pa. St. 125, says: "It may not be amiss, with a view to call attention to it, to notice that this was not an ecclesiastical or church trial, concerning matters of conscience. It was an ordinary secular or business affair, being the same kind of trial which any other corporation might engage in. It might be well to consider how far such trials on Sunday comport with the legislation of the state and the genius of our institutions. It will also be remembered that Jews, who regard the seventh day only as their Sabbath, are bound to observe the civil regulations made for the observance of the Christian Sabbath."

[1] Citing Merritt v. Earle, 31 Barb. 38, 41.

CHAPTER VIII.

Jurisdiction of Courts over Societies. Part I.

Sec. 129. Visitorial power of courts.
Sec. 130. } Courts will not take jurisdiction until remedies provided for
Sec. 131. } in the society have been exhausted.
Sec. 132. Courts may not be ousted of jurisdiction over societies, by contract.
Sec. 133. When courts will not take jurisdiction.
Sec. 134. Injunction of court interfering with internal management.
Sec. 135. Injunction to restrain illegal act of the society.
Sec. 136. Injunction to restrain society from carrying on business upon erroneous principles and plans.
Sec. 137. } *Status* of unincorporated societies in courts of justice.
Sec. 138. }
Sec. 139. Dissolution of an unincorporated society.
Sec. 140. } When dissolution of a society will not be decreed.
Sec. 141. }
Sec. 142. Dissolution of an incorporated society.
Sec. 143. When a society is dissolved by its own act or neglect.

Sec. 129. Visitorial power of courts. The visitorial or superintending power of the state over incorporated societies created by the legislature will always be exercised in proper cases, through the medium of the courts of the state, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchises. To this end, the court will appoint receivers, and issue writs of *quo warranto*, *mandamus*, or injunction, as the exigencies of the particular case may require; will inquire into the grievance complained of, and, if the same is found to exist, will apply such remedy as the law prescribes. Every corporation of the state, whether public or private, civil or municipal, is subject to this superintending control, although in its exercise different rules may be applied to different classes of corporations.[1]

But over unincorporated societies the state has no visitorial or superintending control. They are not created by the state,

[1] State *ex rel.* v. Chamber of Commerce, 47 Wis. 670.

but are brought into being by the contract of the members. Courts will interfere, on the application of an aggrieved member, to see that his property or civil rights are governed according to such contract, but will, in no wise, interfere with the terms of the contract, so long as they are not contrary to law.

The doctrine, as laid down by the Supreme Court of Illinois in People *ex rel.* Rice v. The Board of Trade of Chicago, 80 Ill. 134, that the power of incorporated voluntary societies to enact by-laws is unlimited, and that courts will not interfere with the enforcement of any by-law thus enacted, is in conflict with the decisions and principles on this subject.

§ 130. Courts will not take jurisdiction until remedies provided for in society have been exhausted. It is the law of voluntary societies, whether incorporated or unincorporated, that they may, in all matters relating to their internal and governmental affairs, and concerning the relations and rights of members, as such, provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed methods of procedure, before invoking the power of the courts of the land.

Men voluntarily enter such societies, and, in becoming members, subscribe to their laws. It is, therefore, no hardship to require them, before seeking their remedy under the law, to exhaust their remedy under the contract of membership. The harmony and efficiency of such societies require that they be permitted, as far as possible, to carry out their purposes and objects in the manner and mode which shall be agreed upon by the members, and that the right to resort to the courts for the settlement of controversies and grievances be restricted.

When the charter, constitution, or by-laws of the society require a member to first seek redress within the society, and by appeal to carry the question to its highest tribunal, he has no right to bring an action against the society in a court of the land, until he has exhausted his remedy in its tribunals.[1]

The plaintiffs were members of a beneficiary association which received its charter from, and was subject to, the laws and usages of a state association, both organizations being subordinate to a national association or council. Acting

[1] Poultney v. Bachman, 31 Hun Y. 508; Harrington v. Association, N. Y. 49; Lafond v. Deems, 81 N. 70 Ga. 340.

under its rules, the state association declared forfeited the charter of the first mentioned association for non-compliance with the constitution, laws, and usages of the state council, and took its property, as provided in its charter. The general laws of the national council provided that a member of the order might appeal from the action of his state or subordinate council, pointed out the steps to be taken, and declared that the decision of a state council should be binding until reversed by the national council. No appeal to the latter was made by the plaintiffs, but they at once resorted to the public courts. The court held that a bill in equity by the plaintiffs to recover back their property so taken, on the ground that their charter had been illegally forfeited, could not be maintained until the plaintiffs had first sought the relief prayed for, from the tribunals provided by the association.[1]

The rights of different persons claiming to represent a subordinate lodge, are to be determined by the constitution of the grand lodge, and, although a subordinate lodge has done acts which render it liable to have its charter declared forfeited to the grand lodge, yet, until such forfeiture has been declared, it is entitled to possession of the property of the lodge; and a bill in equity cannot be maintained against its members to recover possession of such property, by persons claiming to be recognized by the grand lodge as the subordinate lodge, until such charter has been formally declared forfeited by the grand lodge, and until the remedies within the society, prescribed by the constitution, have been exhausted.[2]

There is no presumption that societies provide methods within themselves for redressing grievances, or settling controversies, and, in the absence of evidence showing the existence and terms of such provisions, the courts will assume that there are none.[3]

§ **131. Same subject continued.** Where the society makes provision for the settlement of controversies between it and its members, or between its members, concerning its government, its dissolution, or its property, courts will refuse to take cognizance of such controversies until those who have grievances have, in the first instance, resorted to and exhausted

[1] Oliver *et al.* v. Hopkins *et al.* Mass. 10 N. E. Rep. 776.

[2] Chamberlain v. Lincoln, 129 Mass. 70.

[3] Olery v. Brown, 51 How. Pr. 92.

the remedies provided by the society; and it is not necessary, in such case, that the language of such provisions shall make it imperative on the members to exhaust these remedies, but it is sufficient that the society has afforded a means for a settlement within the society itself; the mere provision of such a means abridges the right to appeal to the courts, until the prescribed means have been pursued. This rule also prevails in matters of discipline, in the expulsion and suspension of members, and arises from the fact that, in such cases, the controversy springs from the contract of membership, and is a matter of internal regulation. With such matters courts are loth to deal, and will take jurisdiction only when compelled to do so. But it has been held that where a member appears in the relation of a creditor of the society, he is not bound to present his claim to the tribunals of the society, unless such provisions stipulate expressly that he must first submit his claim to the tribunals of the society, before seeking to enforce it at law.[1]

Courts will not interfere at all in the matters of a society, where there are no civil or property rights involved, and, even where the controversy is concerning such rights, courts will not act unless they see clearly that they are obliged to take jurisdiction. They will only interfere to protect some civil right, or for the due disposal and administration of property.[2]

§ 132. Courts may not be ousted of jurisdiction. But it has been held that while a society may, by its by-laws, compel members to submit their controversies concerning its property and their rights therein, to the tribunals of the society, before seeking the aid of the courts, it may not prohibit them entirely from resorting to the courts. So long as the members of the society recognize its decisions as final on questions of property rights, the law interposes no objection; but when a member refuses to abide by the decision of the society, depriving him of his interest in its property, it is the duty of the courts, on his application, to afford him his proper remedy.

The remedy of an expelled member who has, by the judgment of the society, been deprived of his rights in its property, has already been treated of; the question now is, how far the judgments, orders and decrees of the society are

[1]See Action on Contract, Chap. XV. Ellison v. Bignold, 2 Jacobs &
[2] Rigby v. Connell, 28 W. R. 650; Walkers 503.

binding upon existing members. This question frequently arises in the attempt of a grand or supreme lodge, whose orders, it is agreed, must be obeyed, to take from a subordinate lodge its property and its rights in the order. It may be laid down as the law that, whatever powers the higher lodges or councils of a society may have, to make rules or laws for the government of subordinate lodges, the courts can never recognize as valid any by-law, the effect of which is to give to these higher bodies the final right to determine when, under what circumstances, and for what causes, the property of the subordinate lodges may be taken, nor will the courts permit or recognize the enforcement of any such by-law, when its enforcement will accomplish, and is designed to accomplish, the confiscation of property, or the taking away of property from one set of members to give to it to another set.[1]

§ 133. When courts will not take jurisdiction. In questions of doctrine or policy, a society is the sole and exclusive judge. Courts of justice will not entertain jurisdiction on the merits of such matters. They will not inquire whether the decision or declaration of the society upon the subject of its principles is in harmony with the traditions, customs, usages and practices of the society, nor will they examine into the merits of the decision of a society, concerning the policy to be adopted by it in its internal government and administration.

The courts take it for granted that the society is the best judge of such matters, and accept its decisions as final.

The society being purely voluntary, the person who joins it consents that he will be bound by the principles and rules of government, which it has adopted or ay madopt. Although he may be dissatisfied with the action of the society in such matters, he has no right to appeal to the courts unless he claims that such action has injured him in his civil or property rights.

In case any civil or property right is affected by such action, the courts will inquire whether the society, under the laws of the State and the provisions of its charter, had authority to decide upon such questions and to pass such laws, and will examine into the proceedings of the society and determine whether they are regular under the rules prescribed by the society.

[1] Goodman v. Jedidjah Lodge, 67 Md. 117: 9 Art. Rep. 13; Austin v. Dearing, 16 N. Y. 112; See "Action on Contract of Society" chapter XV.

It is of the essence of a voluntary society and of its right to establish a tribunal for the decision of questions of principle and policy arising upon matters of internal government, that its decisions should be binding and final, subject only to such appeals as the society itself provides for.

This power to decide upon such questions is, in some respects, analogous to, and is certainly as necessary as, the power to pass by-laws for the government of the society.

A court of equity in this country will not interpret the organic laws of a mutual benefit society to determine whether subordinate lodges conform to its tenets, and specifically to direct the conduct of officers and agents in performing their duties, but will accept the decision of the authorized tribunals of the society. To interfere in such matters would amount to administering the internal affairs of such society.[1]

A court will not inquire whether it is necessary to establish other funds and plans of insurance for the protection of the members and their beneficiaries, in addition to those already established in a society, nor will a court restrain the officers of a society in the creation and dispensation of a fund which such society has, within the proper objects of its existence, provided for. These are matters of internal regulation.[2]

Nor will a court interfere to control the discretion of the officers of a mutual benefit society in the management of the funds of a society, as, for instance, to direct them to pay a death benefit from the reserve fund of the society, instead of by levying an assessment, when the reserve fund is within the limited amount which it may carry. This is a matter of internal regulation and management.[3]

§ 134. Injunction interfering with internal management. A court of equity is slow to interfere in the mere police courts of a society incorporated for benevolent and charitable objects, and will not apply the harsh remedy of injunction, except in cases clearly made out by proof, and where all other remedies are exhausted. It will not restrain the officers of such a society from enforcing its by-laws, unless they are clearly so unreasonable as to be null and void.[4]

§ 135. Injunction to restrain illegal act of society. If the officers of an incorporated society are about

[1] Stadler *et al.* v. I. O. B'nai B'rith, 3 Am. Law Record, 589.
[2] Stadler v. I. O. B. B. *supra.*
[3] Crossman v. Mass. Mutual, etc., Mass.; 9 N. E. Rep., 753.
[4] Hussey *et al.* v. Gallaher *et al*, 61 Ga., 86; Kerr on Injunctions, Chap. 23, 24, 28.

to engage in a method of doing business, or an enterprise, not contemplated by the charter, or to apply its funds or credit to other purposes than those specified in its charter, a court of equity will interfere by injunction, at the instance of any of its members.

§ 136. Injunction to restrain society from carrying on business upon erroneous principles and plans. In Reeve v. Parkins, 2 Jac. and Walker's Repts. 300, an injunction was granted restraining a friendly society from applying any of its funds to the payment of annuities payable according to the rules and plan of the society, when the annuities chargeable on the funds have, in consequence of the erroneous principles upon which the plan was founded, become so numerous as to be likely to exhaust the whole fund in the hands of the society.[1]

§ 137. Status of unincorporated societies in courts of justice. It is exceedingly difficult to define the *status* of unincorporated societies under the law. It seems that they were entirely unknown to the common law, and that their existence has been recognized in the statutes of very few states.

It is generally assumed in the decisions of courts upon questions involving rights under such organizations, that they must either partake of the nature of corporations or of partnerships, and that, as the law does not incline to give the shield of the acts of incorporation to unincorporated bodies, they must necessarily be governed largely by the rules which govern in matters of partnership.

It is acknowledged that an unincorporated society is *sui generis*, but courts do not agree as to the legal principles which they will apply to it.

If it be stated that such a society must be regarded as a partnership, it is not difficult to cite numerous authorities as sustaining the proposition; but it is equally easy to find authorities which hold the contrary doctrine.

Many cases hold that, in some of their relations, they are to be regarded as partnerships, and to be governed by the general law of partnerships; and that, in other relations, the law of corporations, in absence of a better rule, is to be regarded as applicable to them.

[1] See Pearce v. Piper, 17 Vesey, 1.

Most cases hold that this distinction is to be made in cases involving the rights of third parties in their relations with the society, or one or more of its members, on the one hand, and in cases involving the rights of members, as between themselves, on the other hand.

The general rule founded upon this distinction has been laid down as follows:

"The true principle is, and upon this view the apparent discordance in the cases may be nearly reconciled, that the law allows associates to imitate the organization and methods of corporations *so far as their rights between themselves are involved*, and will enforce their articles of agreement (nothing illegal or unconscientious appearing) as between the parties to them. But the public and creditors have a right to invoke the application of the law of partnership to the dealings of any trading association, unless such association has the shield of incorporation.

Thus, if the controversy is between members of the association, and relates to such subjects as modes of acquiring membership, tenure of the property, division of the profits, transfer of shares, voting, expulsion, dissolution, or the like, the courts may deal with the association by analogy to the law of corporations, so far as the compact between the members contemplates. But if the question is between the association or its members and third parties, and relates to such points as in what name the association may sue, whether members are individually liable to the creditor for debts, etc., a mere compact of association cannot vary the rights of strangers to it, but the associates must submit to the general rules of law applicable to the questions raised." [1]

§ **138. Same subject continued.** An association for purposes of mutual benevolence among its members only, such as a lodge of Odd Fellows, is not an association for charitable uses. If not incorporated, its members are regarded in law as partners in their relations to third persons, and the property of the association must be appropriated to pay the debts of creditors who are not members, before it can be applied toward payment of the claims of its members. [2]

An unincorporated society organized for relief in sickness, etc., by means of a fund raised by subscription of the mem-

[1] Abb. Dig. Corp. title, Associations; There is no doubt but that a large number of seemingly conflicting cases can be reconciled under this distinction.

[2] Rabb v. Reed, 5 Rawle 151.

bers, must be considered in the nature of a partnership, and in a suit against the trustees by some members, for an account, alleging a dissolution contrary to the articles, all other members must be parties. [1]

An unincorporated voluntary society formed for mutual relief in sickness or distress, by funds raised by initiation fees, fines, dues, and assessments upon its members, partakes of the nature of a partnership. [2]

While a member has no severable interest in the property of such a society—and has no interest which is transmissible—yet the rights of members in this property, and the modes of enforcing these rights, are not materially different from those of partners in partnership property. [3]

Prima facie the interest of each member in the property of the society is equal and proportionate, but his interest cannot be separated and reduced to his possession, until the society has been dissolved, and the rights of all parties in the property have been adjusted and determined. His interest in, and right to use, this property may cease by refusal to comply with the contract of association, by death, or by expulsion for improper conduct, and his rights, in this regard, are far different from the rights of a partner to partnership assets.

In Lafond v. Deems, 81 N. Y. 508, the Supreme Court of New York held that the minority of the members are not entitled to a decree of dissolution of the association on grounds which might be urged for the dissolution of a partnership; that a society, where there is no power to compel the payment of dues, and where the right of the member ceases on his failure to make such payment, is not a partnership.

A mutual benefit society formed by several persons who carry on business substantially for the benefit of the individual members among themselves, and not for the benefit of the society as such, is not to be regarded as a partnership. [4]

§ 139. Dissolution of an unincorporated society. A court will require a strong case to be made out, before it will dissolve an unincorporated society, and decree a sale of the whole concern, but in the dissolution of such an association, it will be governed by the same principles which obtain in the dissolution of partnerships.

[1] Beaumont v. Meredith, 3 Ves. & Beam. 180.

[2] Gorman v. Russell *et al.*, 14 Cal. 531; Rabb v. Reed, 5 Rawle (Pa.) 158; Pierce v. Piper, 17 Vesey 15; Ellison v. Reynolds, 2 Jac & Walker 511; Reeve v. Parkins, 2 Jac. & Walker 300.

[3] McMahon v. Rauhr, 47 N. Y. 69.

[4] Bear v. Bromley, 11 Eng. Law & Eq. 414.

Not only willful acts of bad faith and fraud, but gross instances of carelessness and waste in the administration of the affairs of the association, as well as exclusion of members from their just share in the management and benefits of the association, preventing the business from being conducted on the stipulated terms, are sufficient grounds for the dissolution of the contract of association by a court of equity. Though the court stands neuter with respect to occasional breaches of agreements between the members of such an association, which are not so grievous as to make it impossible for the association to continue; yet, when it finds that the acts complained of are of such a character that relief cannot be given to the members, except by dissolution, the court will decree a dissolution, even though not specifically asked.

When it is insisted that the conduct of a majority of the members entitles the minority to a dissolution, the court must consider not merely the terms of the express contract between them, but also the duties and obligations implied in every such contract of association.

If such an association exclude a member from its meetings, because he refuses to take an oath to be administered by the president, which oath is not required by the constitution or the by-laws, and is foreign to the objects of the association, it is ground for a dissolution.[1]

§ 140. When dissolution of a society will not be decreed. Courts should not, as a general rule, interfere with the contentions and quarrels of voluntary associations, so long as the government is fairly and honestly administered.[2]

Before a court will decree a dissolution of a society, opportunity will be given, where it can properly be done, for a correction of the cause of complaint within the society.[3]

Where a majority of the association have mistaken their powers or duties, and acted under such mistake, and are willing to correct the error, a court of equity will not necessarily dissolve the association, but may give them an opportunity to correct the mistake.[4]

An unincorporated voluntary society for mutual relief, having excluded certain members from the association because of their refusal to take an oath not required by its constitution or by-laws and foreign to the objects thereof, these members, as plaintiffs, instituted a proceeding for the dissolu-

[1] Gorman v. Russel, 14 Cal., 531.
[2] Lafond v. Deems, 81 N. Y., 508.
[3] Lafond v. Deems, 81 N. Y., 508.
[4] Gorman v. Russell, 14 Cal., 531.

tion of the society and the distribution of its funds. The supreme court, having decided on demurrer to the complaint that the society was a partnership, and would be dissolved by a court of equity for improperly excluding a member, remanded the cause for further proceedings.

The society then rescinded its resolution requiring an oath, and filed an answer offering to admit the plaintiffs to all their rights and privileges in the society.

The Supreme Court of California held that this action of the society sufficed to prevent a decree of dissolution, and that the bill was properly dismissed in the court below.[1]

Mere mistakes, or acts of misuser, or non-user are not enough to warrant a judgment of ouster against an incorporated mutual benefit society.

Such a society cannot be dissolved on account of loss of members, when enough remain to supply vacancies and continue the succession.[2]

Notice of a special meeting of a society, which does not state the business to be transacted, does not authorize a vote to dissolve the association and dispose of its property.[3]

§ **141. Same subject continued.** A voluntary association instituted for moral, benevolent and social objects should not be dissolved by the courts for slight causes; and, if at all, only when it is entirely apparent that the organization has ceased to answer the ends of its existence, and no other mode of relief is attainable.

The parties to a proceeding were members of an unincorporated association for moral improvement, relief in sickness, and in case of death. In an action brought to dissolve the association, it was urged that the association was divided into factions; that the feelings of hostility between the members were such as to render it impossible for them to agree as to the transaction of its business and the care of its funds, and that the usefulness of the association had departed.

By the constitution and by-laws of the association provision was made for redress of grievances, and for the punishment of parties offending, and it was within the power of the association to suppress conduct of the kind complained of. An appeal was authorized to a higher tribunal. No complaint before the association had been made against the members

[1] Gorman v. Russell, 18 Cal., 688.

[2] State v. Société Republicaine N. H. 9 Atl. Rep., 98.

[3] St. Mary's Ben. Ass'n v. Lynch etc., 9 Mo., App., 114.

charged by plaintiffs with a violation of the rules. The by-laws provided that the association should not be dissolved, save by unanimous vote, and that no motion to dissolve should be entertained so long as ten members remained in good standing.

The court held that the action was not maintainable; that plaintiffs were at least required in the first instance to resort to the remedies provided by the rules of the association, before seeking the interposition of a court of equity.[1]

In the same proceeding it was urged, as a further ground for the dissolution of the association, that it had hired more room than was necessary for their meetings; that it had fitted up, furnished and sublet the portion it did not require, and rented its own room when not in use, and that it had from these rents accumulated a large fund; but the court held that the association in such matters might exercise a reasonable discretion and where the renting of rooms was merely incidental to its primary object, and the rents received were the result of accident and good management, in the exercise of a proper discretion, having in view merely the accommodation and prosperity of the association, there was no such accumulation of funds as would call for the dissolution of the association on that ground.

In cases of violent dissensions and irreconcilable differences between the members of a voluntary association, judgment will be rendered at the suit of one or more members against all the others, dissolving the society; but no action will be entertained for such a purpose upon mere proof of differences of opinion, bad temper, the ordinary disputes common to such societies, nor upon proof of injuries or injustice sustained by one member, through the vote or action of the society, if he have another remedy.[2]

Where the constitution of a society provides that it shall not be dissolved so long as a certain number of members desire its continuance, such provision is controlling in an action to obtain a decree of dissolution, and if that number of members oppose a dissolution when the vote is put in the society, or, if there be no vote, when the action is commenced, dissolution will not be decreed.[3]

[1] La Fond *et al.* v. Deems *et al.* 81 N. Y. 508.

[2] Fischer v. Raab *et al.*, 57 How. Pr 87.

[3] Fischer v. Raab *et al.* 57 How. Pr. 87; La Fond *et al.* v. Deems *et al.* 81 N. Y. 508; St. Mary's Ben. Ass'n v. Lynch, N. H.; 9 Atl. Rep. 98.

§ 142. Dissolution of an incorporated society. Whether a corporation which is shown, upon a *quo warranto* proceeding, to have misused or abused its franchises, should be ousted of its corporate franchises, is a question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it.

Where trustees of a society had operated it for their own profit, and had misused and abused its franchise, the Supreme Court of Ohio, said: "The present membership of the defendant, numbers about thirty-five hundred, chiefly worthy and deserving people, utterly innocent, if not wholly ignorant of any misuse or abuse of its franchises. Purged of the unfortunate features of its management which this trial has developed, this association is capable of much usefulness. To visit the perversion of its objects by a few, upon the heads of the entire membership must result in irremediable hardship; and without stating more fully the grounds of our action, or the considerations which move us, it must serve our present purpose to say that the relators' prayer that the defendant be ousted of its franchise to be a corporation is refused. Judgment will be entered, however, ousting it of the use of its franchises for the profit of its trustees.[1]

An incorporated society organized under an original act, against which an information in the nature of a *quo warranto* was pending at the time of the passage of the amendatory act, is entitled, in such suits, to the benefit of the amendment.[2]

As the contract of insurance in a mutual benefit society is a personal contract between the society and the member, it follows that, unless the society is permitted by the express provisions of the law governing its organization to admit infants into its membership, a contract between the society and a person who has not attained the age of majority, is one into which the society may not enter.

Infants were incapacitated by the common law from entering into contracts, and there is nothing in the contract of mutual benefit insurance, which will permit a society to disregard an established rule of the common law. And where a society provides in its by-laws that contracts may be entered into by it with persons who are not of lawful age, and where

[1] State *ex rel.* v. Peoples' etc., Ass'n., 42 Ohio St. 579.

[2] State v. Mutual Protection Association, 26 Ohio St. 19.

the society issues certificates of membership to minors, in the regular course of business, it may be dissolved.

Where the statute under which a society is incorporated provides that no part of the funds collected for the payment of death benefits shall be applied to any other purpose, it is unlawful, and a ground of dissolution, for the society to use, in the payment of running expenses, any part of the fund acquired from mortuary assessments.

In *quo warranto* against an incorporated society, where it has assumed franchises not granted, and it appears that the certificate of incorporation does not comply with the requirements of the statute under which it is organized, the court, in the exercise of its discretion, will oust it of the franchise to be a corporation.[1]

§ 143. When society is dissolved by its own act or neglect. A chapter of Free Masons, in 1836, disposed of all their real and personal property, consisting of their hall, furniture and equipment, pursuant to a vote of the chapter, and for twenty-three years held no meetings, elected no officers, performed no acts required by its by-laws and rules, and ceased to have any visible sign of existence; it was held that the legal existence of the chapter was gone, and that it was beyond the power of the state chapter to restore it to life so as to preserve for it a continued existence from 1836.

A rule of the society that the officers should hold their offices until their successors were elected, could not, in such a case as above stated, operate to preserve its legal existence.[2]

A legal surrender of the corporate franchise of a mutual benefit society will not be presumed from non-user, nor from failure to collect dues, or to hold meetings, for six months, or any short period of time.[3]

A society, the members of which must be elected by the vote of existing members, is dissolved by the death of all the members, whether such society be incorporated or unincorporated.[4]

The grand lodge of a society cannot make new regulations subversive of fundamental principles and land marks of the order, without the clear consent of the subordinate lodges;

[1] State v. Central Ohio Mutual Relief Association, 29 Oh. St. 399.

[2] Strickland *et al.* v. Pritchard *et al.* 37 Vt. 324.

[3] State v. Societe Republicaine etc., 9 Mo. App. 114.

[4] Morawetz on Corp.' at section 1009.

nor can the officers of a corporation composed of several integral parts, dissolve the corporation, without the full assent of the great body of the society.

The dereliction of the charter by the heads of the corporation does not dissolve the corporate body, especially if the remaining members have the power of renovating the head.[1]

[1] Smith v. Smith, 3 Desau. (S. C.) 557; See State v. Societe Republicaine etc., 9 Mo. App. 114.

Jurisdiction of Courts over Societies. Part II.

SEC. 144. } Dissolution, trust funds—distribution of property on
SEC. 146. } dissolution.
SEC. 147. } Trust funds and trustees.
SEC. 149. }
SEC. 150. Rights of contributors to funds of society.
SEC. 151. } Rights of members in property and funds of society.
SEC. 152. }
SEC. 153. Revocation of charter granted by the state.

§ 144. Dissolution, trust funds—distribution of property on dissolution. The dissolution of a voluntary society cannot be prevented. It is in the power of any association, whether incorporated or not, except such as are created for the administration of political or municipal authority, to dissolve itself by its own assent. This has been repeatedly adjudged.

But it by no means follows that the members of a society, holding funds in trust, or of a body incorporated for eleemosynary purposes, can, on such dissolution, appropriate its funds among themselves. Mere monied corporations, whose funds are owned solely by the stockholders, and are not held in any manner for charitable or public use, may do this, but no others.

The society may be dissolved, but the trust fund is not, therefore, to be either distributed or abandoned. It is an established maxim in equity that no trust shall fail for want of a proper trustee. Such fund may be saved to carry out the original purposes and wishes of the donors or contributors.

Where the funds of a Masonic lodge have accumulated under a by-law that they shall be appropriated "for the good of the craft, or the relief of indigent and distressed worthy masons, their widows and orphans," these funds are in the hands of the acting members for a charitable use, and a dissolution of the lodge and a division of the funds among the acting members for their private use, is a violation of the trust on which the fund was raised. [1]

In 1870, a subordinate charitable society was incorporated, chartered and organized under the powers and regulations of

[1] Duke v. Fuller, 9 N. H. 536.

the general council of the association. One of the provisions of its charter was that, if it should dissolve, its charitable funds should be paid over to the general council, and be held and disbursed by the latter, according to its rules. These rules provided for holding the funds by that council in trust for the purposes to which the widows' and orphans' fund was devoted originally, and for refunding them if the subordinate council should reorganize.

In 1881, the subordinate council voluntarily disbanded, surrendered its charter to the general council, and under a resolution, divided all its charitable funds among its members then in good standing.

The court held that it had jurisdiction to compel those participating in the division to refund to the general council the money so received by them. [1]

Although a court of equity may not decree a dissolution of an incorporated society unless that power be expressly conferred by statute, yet, in virtue of its general jurisdiction over trusts, it has jurisdiction to grant relief against an incorporated society upon the same terms as against an individual under similar circumstances, and it will interfere to prevent an actual or threatened misapplication of its funds.

§ 145. Same subject continued. It may be stated, upon both principle and authority, that when a corporation is virtually dead, although its term of existence limited by law has not expired, and it has property or assets, which cannot be used in carrying out the purposes of the corporation, remaining in its hands, courts have jurisdiction to distribute such property and assets among its members upon such a basis as shall be just and equitable.

Where the functions of a corporation have ceased, the managers of that corporation are bound to account for all moneys belonging to the corporation, and when such moneys are improperly retained, a court of justice will make a decree, in order that they may be divided among the various members.

A mutual benefit society which has created an endowment fund, cannot, on being refused a license by the state in which it was incorporated, and thus being compelled to cease business, organize a new company, and, against the protest of parties insured, use such endowment fund to obtain reinsurance of the old members in the new society; and the members insured, in

[1] State Council O. U. A. M. v. Sharp *et al.*, 38 N. J. Eq, 24.

such case, may proceed in a court of equity to wind up the affairs of the old society and compel the distribution of such fund among those for whose benefit it was created.[1]

A mutual benefit society organized to pay monthly to the widows of members a sum of money, which has the right to dissolve at any time on the votes of a certain number of members, if so dissolved, cannot be administered by a court of equity in perpetuity, by the continued collection of dues, but the funds in the treasury must be distributed, and the society wound up.[2]

A mutual benefit society, the dues of which were to be used to pay to the widows of members fifteen dollars per month during widowhood and good deportment, in the judgment of the directors, being dissolved, the fund in the treasury at the time of the dissolution was ordered to be distributed as follows: The valued annuity, by annuity tables, of each widow's life, at the date of dissolution, at the rate of fifteen dollars per month, must be first ascertained, without taking into consideration the possibility of her marrying again, or not properly conducting herself, and the fund, if insufficient, paid *pro rata*, and if sufficient to pay the annuities in full, the remainder to be divided equally among the members surviving at the date of dissolution. The widows of those dying since dissolution were not to have their annuity value reckoned and allowed, but were required to work out their rights through the estates of their deceased husbands. The rights of a widow who remarried prior to distribution ceased on such remarriage, though she again became a widow, for she is then the widow of the last, and not of the first husband. Where, by reason of the surviving members not being made parties, no final distribution was made, and by reason of some of the widows who were made parties being in default for answer, another widow receives, under decree of court, more than the present value of her annuity, she is not to be compelled to repay the excess, on the stockholders being made parties, and the other widows then insisting on their rights.

Where, by investment of the fund after dissolution and before final distribution, it has increased, each widow is entitled to the portion of the net accumulations produced by the investment of the amount due her on her annuity value.[3]

[1] Stamm *et al.* v. N. W. Mut. Ben. Ass'n., Mich. 32 N. W. Rep. 710.

[2] Collier v. Steamboat Captains' Benevolent Ass'n., 1 Cin. Law Bull., 18.

[3] Collier v. Association, *supra*.

§ **146. Same subject continued.** The minority of the members of a lodge being outvoted upon the disposition of funds, brought an action against its trustees, charging them with an intention to divert the funds, and, by concealing the fact of the vote, obtained an injunction and the appointment of a receiver, which action the court revoked upon full information. Subsequently the district grand lodge, at the instigation of the minority of the lodge, revoked the charter of the lodge referred to, and thereupon the minority filed a bill in their individual names for a proportion of the funds, alleging that the lodge had ceased to exist "through no fault of theirs."

The court held that the conduct of plaintiffs, who had voluntarily seceded from the lodge, and formed a separate lodge under authority of the district grand lodge, was so unfair and inequitable as to preclude them from relief.

Courts will never recognize as valid any rule or law of a mutual benefit society, the effect of which is to confiscate property, or arbitrarily take away property rights from one set of members and give them to another set.

Where a minority of the members claim title to property of the society under an arbitrary forfeiture of the charter of a subordinate lodge by the supreme lodge of the society, they cannot recover.[1]

The facts in this case showed that the trustees had appropriated from nine to ten thousand dollars of the funds of the old society, amounting to about fifty thousand dollars, and had paid the same to the new society for reinsurance of members who had insured in the new company, and accepted a cancellation of their certificates of membership in the old society. The court says:

"These facts show the necessity for the interposition of a court of equity to prevent a further misapplication of the funds of the old association, and to decree an equitable distribution thereof. Otherwise, what is to become of this large accumulation of money now in the hands of the trustees? The new association is not entitled to it. The trustees have no right to appropriate it. It cannot be used in carrying out the purposes for which it was created. There is no equity in applying it to the payment of death losses in full, as they occur, for, aside from there being no contract to that effect,

[1] Goodman v. Jedidjah Lodge, 67 Md. 117; 9 Alt. Rep. 13.

it would, in the natural course of events, be exhausted long before membership in the association would be terminated by death, and the surviving members would receive nothing."

A voluntary association of individuals who have contributed funds for a public purpose will be regarded as a charity, and a court of equity has jurisdiction over the parties.

Funds supplied from private gifts for legal, general or public purposes, are charitable funds, to be administered by a court of equity. An unincorporated fire-engine or hose company is not a partnership as between its members, whatever may be its relations to third persons.

Where the association is for private and individual profit or pleasure, with no public object, it is treated as a copartnership. So, where the association is for private emolument, or for benevolence, confined exclusively to the members, and in which none others participate, as between themselves they are partners. But a private unincorporated association for general purposes of public utility, a court of equity will not treat as a partnership, nor declare its dissolution and divide its assets among the members composing it.

Property given to such an association is pledged to the objects for which it was intended to be applied by the successive contributors, and cannot be diverted from them, while those remain who are ready and willing to execute the public trust with which it has been clothed. A court of equity will not suffer its funds to be diverted to other uses than the donors intended.[1]

In private unincorporated associations of individuals for public purposes, the majority cannot bind the minority in the disposition and management of its funds, unless by special agreement.[2]

§ 147. **Trust funds, trustees.** It has been held that money contributed by the members of a society to a common fund, to be applied to the relief and assistance of its members, when in sickness, want of employment, or other disability, is not a charitable fund to be controlled by a court of equity.[3]

There is, however, a distinction between a fund contributed by the members of a society, to be employed and disposed of among themselves, as they may agree, and a gift conferred as

[1] Thomas v. Ellmaker, 1 Par. Sel. Cases (Pa.) 98.

[2] Thomas v. Ellmaker, 1 Par. Sel. Cases (Pa.) 98; Livingston v. Lynch, 4 Johnson's Ch. (N. Y.) 573.

[3] Rabb v. Reed, 5 Rawle 151.

a matter of bounty upon such society, in trust to be distributed in charity.

Where the fund belongs to the first class, courts of equity will not, as a general rule, interfere with the mere administration of the fund, for this would be a virtual administration of the internal affairs of the society. In such a case, to authorize the court to interfere, it must be shown that the fund is distinctly impressed with the qualities of a trust, and that the trust has been, or is about to be violated by a misapplication of the fund.

Whether a fund formed by the contributions of the members of a society has been impressed with a trust and so accepted, is a question of fact always open to judicial inquiry, and whether the alleged trustee be an individual, or a collective body of individuals, incorporated or otherwise, no act, declaration, or decision of such trustee will prevent such inquiry. If the terms of the alleged trust are contained in an instrument of gift, that instrument will be examined and the intentions of the donor carried into execution. If expressed in the articles of association of a voluntary society, these articles will be carried into specific execution for the purpose of enforcing the trust; and if in the fundamental law, or in the ordinances and by-laws of a society, on the faith of which contributions have been made, the court will adopt the construction of the members, and apply relief according to their own views of the law.

An ordinance of a society, which provides for the creation of a fund for the benefit of the widows, orphans, heirs, or designated beneficiaries of the members, and commits the administration of such fund to the officers of the society, impresses any money paid into such fund with the qualities of a trust for the special purposes expressed therein; and the fund thus formed can properly be applied only in that particular manner pointed out in such ordinance, which, in this regard, is to be treated as an express declaration of trust.

Where funds have been contributed by members of a society, under its by-laws, for the exclusive benefit of its own members when in sickness and distress, and have accumulated in the treasury, such by-laws will be treated as declarations of trust, and a court of equity will not permit such accumulations to be diverted from the specified objects.

And funds collected by the separate lodges of a mutual benefit society from their own members, for the exclusive

benefit of the members of each, are held in trust for the special purposes expressed in their by-laws and ordinances, which are to be treated as express declarations of trust, and the appropriation of any part of such funds to a new purpose, by order of a representative body governing the subordinate lodges, is a misappropriation which a court of equity will restrain, on application of members of such lodges.[1]

§ **148. Trust funds and trustees continued**. The funds of a society were kept on deposit in bank, subject to the order of the trustees. One of the by-laws of the society provided that the trustees should "keep the funds invested, for the best interests of this tribe, in such stocks, bonds, mortgages, or other securities as shall be approved by two-thirds of the members thereof present at a regular council."

An order was passed by the tribe or society, instructing the trustees "to try and invest the money in the bank, not exceeding $2,000." Such an order does not purport to authorize an investment of money of the tribe otherwise than "in stocks, bonds, mortgages, or other securities, approved by two-thirds of the members thereof present at a regular council"—, and an investment of any of such funds by the trustees in real estate bought of a member of such tribe or society, is voidable at the election of the society.

In an action against the trustees and the vendor to have such a purchase declared void, evidence that one of the trustees understood that the propriety of the purchase was first to be submitted to the society, is admissible; and evidence that one of the trustees acted without the concurrence of a co-trustee, or that the latter was induced to concur in his act by reason of misrepresentations which he had made with respect to the concurrence of a third trustee, is also admissible. In such an action the question whether the acts of the officer were fair or unfair is to be determined by the jury, and not by the trustees who may be called as witnesses.

Where a mortgage made by the vendor has been paid off and cancelled with funds derived from a fraudulent sale of property to the society, and suit is brought to set aside such sale, the vendor and mortgagee being parties, the mortgage may be revived and enforced for the benefit of the society against all the property therein described, to the extent of the

[1] Stadler v. District Grand Lodge I. O. B. B. 3 Am. Law Record, 589.

amount applied by the vendor to its satisfaction, from the proceeds of such fraudulent sale.[1]

A member of a society, who is elected its treasurer to receive and invest the funds of the society in his individual name, and who does so invest them, holds the funds as a trustee for the society, and is subject, as such trustee, to the jurisdiction of a court of equity.[2]

Neither the society nor its officers can appropriate its funds to other purposes than those for which they were intended, and a court of equity will interfere to prevent a wrongful disposition of them.[3]

§ 149. Trust funds and trustees continued. Where trustees of a lodge, who had executed their notes for its debts, made a *bona fide* sale of its property to a stranger in consideration of his agreement to pay such notes, they might thereafter, as individuals, repurchase said property from such purchaser, and the mere fact that they did so, without any consideration other than their agreement to pay the notes assumed by the purchaser, did not render such sale fraudulent and void as to the creditors of the lodge.[4]

Zealous as courts of equity are, in watching the conduct of a trustee in connection with the objects of his trust, he is only forbidden by them from dealing with the trust property for his own benefit, so long as the trust continues. The moment it ceases, he occupies precisely the same relation to it that strangers to the trust do, and, acting in good faith, he may become the owner by purchase or otherwise.[5]

The fact that an unincorporated society, not a charity, is subject to the sole government and control of a superior body, does not deprive courts of their jurisdiction to compel certain trustees of the society, removable at its pleasure, to transfer the trust estate to new trustees duly chosen by it.[6]

A bill in equity stated that the plaintiffs and many others had formed a voluntary association for benevolent purposes, that the name of the association was afterward changed by vote of its members at a regular meeting, that the funds of the association were deposited for its use in the names of its four trustees in a savings bank, that one of its trustees had refused

[1] Red Jacket Tribe, I. O. R. M. v. Gibson *et al.*, 70 Cal. 128.

[2] Weld v. May, 9 Cush. (Mass.) 181.

[3] Penfield v. Skinner, 11 Vt. 296; Bailey v. Lewis, 3 Day (Conn.) 450.

[4] Miller v. Lebanon Lodge, 88 Ind. 286.

[5] Munn v. Burgess, 70 Ill. 604; Bush v. Sherman, 80 Ill. 160.

[6] Brown *et al.* v. Griffen *et al.*, 14 Weekly Notes of Cases. 358.

to join with his co-trustees in an assignment of those funds to their successors, and that the bank had refused to transfer the funds without such an assignment; it prayed that the savings bank might be ordered to transfer the funds, and that the trustee might be ordered to join in the assignment. The court held that plaintiffs and their associates might maintain the bill.[1]

§ 150. Rights of contributors to funds of society. The contributors to a fund raised and placed in the hands of trustees for a specific purpose, have a right to have repaid to them, in proportion to their contributions, any surplus not needed for the object. The claim is founded in equity, and will be enforced in the courts.

This fund is in the control of the society, only for the purpose for which it was raised. It may be disposed of for any purpose within the object for which it was contributed, at any regular meeting of the society, by the voice of the majority of the members present, even if a minority of the whole number. But the vote must be for some purpose for which the money was contributed. A majority cannot devote the money of the minority, or even of a single member, to any other purpose, without his consent.

All persons present at the meeting at which the vote is taken, disposing of the fund, if no one dissents, are considered as voting with the majority for the motion, and assenting thereto. Their right to the fund is concluded; but it is otherwise as to those not present.

Where, under a resolution of the majority, the surplus fund has passed into the hands of new trustees, between whom and the original contributors there is no privity, such trustees are not accountable to them for the fund. Their remedy is against the original trustees only.[2]

The Supreme Court of Kentucky interfered to require the funds raised by a fair, to be applied to the objects for which the fair was held, and to prevent self-constituted trustees from diverting such funds from those objects.[3]

Contributors to a fund creating a trust for religious or charitable purposes, cannot, as such, call the trustees to an account for their disposition of the fund. They have no stand-

[1] Birmingham *et al.* v. Gallagher & Savings Bank, 112 Mass. 190; See Snow v. Wheeler, 113 Mass. 179.

[2] Abels v. McKeen, 18 N. J. E. 462.

[3] Morton v. Smith, 5 Bush. (Ky.) 467.

ing in court for such a purpose, unless they are trustees, or *cestuis qui trustent*, or have some reversionary interest in the trust fund.[1]

An action for money had and received may be maintained by a member of an unincorporated voluntary society against the treasurer, to recover the amount of his contribution, where it appears that the latter has possession of the funds, and the purposes and objects for which the contributions were made cannot be accomplished.[2]

If it is so provided, the majority may control the minority by a vote, if such vote is for the purposes of the association, and within its provisions. Courts of chancery have power to see that societies are faithful trustees in the disposition of the fund, and will see that it is appropriated to the object designed, and will not suffer it to be diverted to another, unless with the consent of the contributors.

§ 151. Rights of members in property and funds of society. Where the society is organized for purposes other than profit, there may be property belonging to it, derived from the payment of dues or fines, or consisting of the furniture of its rooms, but the possession of such property is a mere incident, and not the main purpose or object of the society. A member has no severable proprietary interest in it, and no right to any proportionable part of it, either during the continuance of his membership, or upon his withdrawal. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the society, while it continues to exist, like a pew, the ultimate and dominant property in which is in the corporation or congregation, and not in the pew-holder; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets.[3]

Upon the sale of land belonging to a voluntary society which is unincorporated, with no rules or provisions as to the disposition of its property, the members at the time of the sale are entitled to divide the proceeds in equal shares.[4]

It is well settled that where members have, contrary to the constitution and government of a voluntary society to which they belonged, severed their connection therewith, they cannot

[1] Ludlam v. Higbee, 11 N. J. Eq. 342.

[2] Koehler v. Brown, 2 Daly 78.

[3] White v. Brownell, 3 Daly (N. Y.) 329; *In re* The St. James Club, 13 Eng. Law & Eq. Rep. 592.

[4] Brown v. Dale, 25 Eng. Rep. (Moak) 776.

invoke the aid of a court of equity to take the property of the society from those who adhere to its organization, objects and government.

A court of equity will not, at the instance of the minority, compel the majority of the owners of the furniture of an Odd Fellows' hall to purchase the interests of the minority therein, nor to remove and sell the same, and divide the proceeds among all the owners, where it appears that the furniture is being used for the very purposes for which it was originally purchased.[1]

A court of equity has power to place the property of an unincorporated society in the hands of a receiver, order the same to be sold, and the proceeds divided among its members; but it will not exercise this power unless equity clearly requires it.

A bill in equity praying for such relief, brought by a minority of the members against a majority, will be dismissed where the evidence fails to show that the property is being mismanaged or wasted.[2]

Where it is shown that the payment of salaries to the officers of a society seems to have been regulated rather by the condition of the expense fund in the treasury than by the compensation actually earned; where the system of paying so called compensation, is but a disguised scheme for a division of profits among its officers; where it appears that the affairs of the society have been operated for the profit of its officers, the courts will, upon application, interfere to protect the interests of the members.[3]

§ 152. Same subject continued. Where two benevolent societies, one of men, and the other of women, having separate organizations but the same objects, united in purchasing a cemetery, each society contributing a moiety of the purchase money, and for a time mutually participating in the use and profit of the property, although the title was taken to the officers of one of them, a subsequent going over of a majority of the members of the other society to that one will not deprive such other society of its rights of property resulting from the payment of half the price, and the same will be declared and enforced by decree of court.[4]

[1] Robbins *et al.* v. Waldo Lodge, Me.; 7 Atl. Rep., 540.

[2] Hinkley *et al.* v. Blethen *et al.*, 78 Me. 221; 3 Atl. Rep. 655.

[3] State *ex rel.* v. Peoples', etc., Ass'n, 42 Ohio St, 579; McCarthy's Appeal, 17 W. N. Cases (Pa), 182.

[4] Ladies' Benevolent Society v. Benevolent Society, 3 Tenn. Ch. 100.

Where certain members of Teutonia Lodge, etc., withdrew from the jurisdiction of the grand lodge of the state, surrendered their charter and formed a new lodge, adopting the same name, and other members continued steadfast in their allegiance, and the charter was duly delivered to them as the lodge, that body which continued true to its allegiance and held the charter, was, as to certain property of the original lodge, taken by the members who withdrew, adjudged to be Teutonia Lodge, etc., and, as such, to be entitled to the property of the society. [1]

The seceding members of an incorporated society, forming a new society, cannot maintain a suit for the recovery of debts due to the society from which they seceded.[2]

In cases of personal chattels in which the remedy at law by damages would be utterly inadequate, and leave the injured party in a state of irremediable loss, equity will interfere and grant full relief, by requiring a specific delivery of the thing which is wrongfully withheld. This may occur where the thing is of peculiar value, as being ancient, or the production of some distinguished artist, or a family relic or ornament. This rule has been held applicable to the personal property of societies; and where a highly ornamented silver tobacco box had been for many years handed down from a certain officer of the society to his successor, and a person retained possession of it after his term of office expired, and refused to deliver it to his successor in office, unless the society would pass his accounts, the court, without measuring the value of the box, decreed it to be delivered up to the proper officer. [3]

A person who has been expelled from the "Society of Believers," commonly called Shakers, cannot maintain an action for services rendered the society prior to such expulsion, or for his expenses of support since separation. [4]

In a social partnership, where an absolute community of property with right of survivorship, on the one hand, and care, by the community, of every member, through life, on the other, is the fundamental and pervading principle, if one member be unjustly expelled by an usurped, though unquestioned, authority, not having under the clear terms of the association any right to expel him, the court will not

[1] Altman *et al.* v. Benz *et al.*, 27 N. J. E. 331,

[2] Smith v. Smith, 3 Desau (S. C.), 557.

[3] Fells v. Read, 3 Ves. Jr 70.

[4] Grosvenor v. United Society, 118 Mass. 78; Waite v. Merrill, 4 Me. 102.

oblige him to return to the association, there not being on its part an offer of full and satisfactory reconciliation and reception, but will interfere with the fundamental and pervading principle; and though the expelled member brought nothing into the community, will give to him, for himself, a separated and individual part of the property. And where payment for the party's services at the ordinary rate of services like his, during many years that he was a member, would give to him more than his numerical proportion or share of the whole capital stock, and where the question of profits was a little obscure, the court, regarding this as the simplest and most natural justice, gave to him his numerical share or proportion of the whole capital stock, from whatever source arising, as the same existed at the time he was expelled, irrespective of the amount which he found in the association when he became a member.[1]

§ 153. **Revocation of charter granted by the state.** The Independent Order of B'nai B'rith, organized for benevolent purposes, has numerous lodges in different states of the Union. The primary or subordinate lodges are grouped into districts, over which are district grand lodges composed of delegates elected by the subordinate lodges. Above these is a "Constitution Grand Lodge." There is also an appellate court for the settlement of controversies arising within the order. Among the general laws is one which requires each subordinate lodge to obey the ordinances, laws and resolutions of the "Constitution Grand Lodge," its district grand lodge, and the final decisions of the appellate court, under penalty of suspension and forfeiture of its charter.

These charters are paper documents emanating from, and issued by the district grand lodges to the subordinate lodges within their respective territorial limits.

Jedidjah Lodge of Baltimore was within the limits of District No. 5, and received a charter from the grand lodge of that district. In December, 1853, Jedidjah Lodge was incorporated under the Act of the Maryland legislature of 1852, and

[1] Nachtrieb v. The Harmony Settlement, 3 Wall. Jr. 66; In a case brought by another complainant against these same defendants, there being imperfect evidence of any expulsion, and the defendants by their answer, "conceding the complainant's perfect right and liberty to return to the enjoyment of all the privileges, benefits and advantages contemplated by the association, he discharging the duties incumbent on him as a member of it," the court refused to grant the complainant any relief, but dismissed the bill with costs; Lemix v. The Harmony Society, 3 Wall. Jr. 87.

in February, 1870, District Grand Lodge No. 5, was incorporated under the general corporation law of Maryland of 1868. A bill was filed in July, 1884 by District Grand Lodge No. 5 against Jedidjah Lodge, alleging that the complainant had forfeited the charter of said Jedidjah Lodge under the laws and constitution of the order, and claiming that, by reason thereof, the funds of said Jedidjah Lodge belonged to the complainant.

The Supreme Court of Maryland held that the charter granted by the state to the Jedidjah Lodge could not be forfeited by the grand lodge, whether acting in its conventional or corporate capacity—that the charter could be annulled by the legislature, or forfeited under such proceedings for that purpose as are authorized by statute or by the common law, and in no other mode, and by no other agency; that the Jedidjah Lodge held the funds in controversy, and had the right to hold them, under the corporate powers conferred by the state charter, and so held them entirely unaffected by the forfeiture of the documentary or conventional charter granted to it by the district grand lodge, by virtue of which forfeiture alone the complainants claimed such funds.[1]

[1] District Grand Lodge v. Jedidjah Lodge 65 Md. 236; 3 Atl. Rep. 104; Goodman v. Jedidjah Lodge, 67 Md. 117; 9 Atl. Rep. 13.

Jurisdiction of Courts over Societies. Part III.

SEC. 154. Religious societies.
SEC. 155. } Ecclesiastical jurisdiction—civil rights.
SEC. 156.
SEC. 157. } Secession in religious society—division of property, etc.
SEC. 158.
SEC. 159. } Property and trusts of religious societies.
SEC. 160.
SEC. 161. Trustees and officers.

§. 154. **Religious societies.** It is not proposed to discuss at length in this work the subject of religious societies, but so many of the principles which govern the courts in their treatment of such societies, are applicable to societies at large, that it is necessary to refer, at least, to the jurisdiction of courts over them. Churches in this country are, in a legal point of view, no more than other societies voluntarily organized by its citizens.

§ 155. **Ecclesiastical jurisdiction—civil rights.** Civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline, and can only interfere in church controversies when civil rights, or rights of property, are involved.

When a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction.

The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective denominations to which they belong

When a person becomes a member of a church he becomes such upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the

supervisory power of a civil court, so long as none of his civil rights are invaded.[1]

While the courts will decide nothing affecting the ecclesiastical rights of a church, yet its civil rights to property are subjects for their examination, to be determined in conformity to the laws of the land, and the principles of equity.[2]

The usage of a church, or the law of its organization as a religious society, if they are to be considered in deciding legal controversies, should be proved as facts.[3]

The testimony of those in authority in the church, such as a bishop of a diocese, is competent to define the meaning of terms and words, as used in the church, and to show the usages and customs of the church.[4]

Courts are frequently required to ascertain facts from history, but then they consult its authentic sources, and ascertain such facts from them, and not from the opinions of witnesses. The mere opinions of witnesses as to departures from the faith of a religious denomination, are not admissible as evidence.[5]

It is not the province of courts of justice to decide, or to inquire what system of religious faith is most consistent, or what religious doctrines are true, or what are false, in any case; and it seldom becomes necessary for courts to discuss, or to examine the creeds, or confessions or systems of faith of the different religious sects, in determining questions of law, except in cases where they are called upon to see that a trust or charity is administered according to the intention of the original founders.[6]

Whether or not devotional singing, forming a part of the public worship of a particular religious society, should be accompanied by instrumental music, must be determined by those who administer the discipline of the church to which they belong.[7]

§ 156. **Same subject continued.** Where the rector of a parish sued the parish for a balance due him on his salary under the canons of the diocese and his contract with the vestry

[1] White Lick, etc., v. White Lick etc., 89 Ind. 136.

[2] Ferraria v. Vasconcellos, 31 Ill. 25.

[3] Vasconcellos v. Ferraria, 27 Ill. 237; Hendrickson v. Decow, 1 N. J. Eq. 577.

[4] Bird v. St. Mark's Church, 62 Iowa 567; Ferraria v. Vasconcellos, 31 Ill. 25.

[5] Happy v. Morton, 33 Ill. 398.

[6] Hale v. Everett, 53 N. H. 9.

[7] Tartar v. Gibbs, 24 Md. 323.

of the parish, it was held that, by the failure to pay him his full salary, a clear legal right had been invaded, and that it was the duty of the civil court to protect and enforce that right.[1]

A purely ecclesiastical office, such as that of a deacon in a church, an office not created or expressly authorized by state law, but created by an unincorporated ecclesiastical body, and filled by election by a body which possesses no corporate powers or functions, is not under the jurisdiction of a court of law, so as to be made subject to a *quo warranto* proceeding.[2]

The decisions of ecclesiastical courts are final as to what constitutes an offense against the discipline of the church.

The civil courts will interfere with churches and religious associations, when rights of property or civil rights are involved, but it will not revise the decisions of such associations upon ecclesiastical matters, merely to ascertain their jurisdiction.[3]

But two justices of the court, in Chase v. Cheney, dissent and say: "We concede that when a spiritual court has once been organized in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and the subject matter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts. The simple reason is that the association is purely voluntary, and, when a person joins it, he consents, that for all spiritual offenses, he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized, and when a clergymen is in danger of being degraded from his office, and losing his salary and means of livelihood by the action of a spiritual court unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We

[1] Bird v. St. Mark's Church, 62 Iowa 568.

[2] Ter Vree v. Geerlings, 55 Mich. 562; 22 N. W. Rep. 89.

[3] Chase *et al.* v. Cheney, 58 Ill. 509; Watson v. Jones, 80 U. S. 679.

consider this position clearly sustainable upon principle and authority."[1]

§ 157. Secession in religious society, division of property, etc. In the absence of testimony, it will be presumed that religious societies cannot dissolve their connection with the principal organization without permission.[2]

Where the usage of a church, or the law of its organization, gives the majority of the members of a congregation the right to withdraw from its ecclesiastical authority, neither the act of the majority in withdrawing, nor the act of the minority in adhering, works a forfeiture of the rights of either to the church property, because in neither case has an illegal act been done.

All the members, the minority adhering to the former church connection, as well as the majority who seceded, therefrom, being equally beneficiaries of the common property, in case of a separation, where such separation is permissible, the property should be divided between the two parties in proportion to their numbers at the time of the separation.[3]

But the rule is, that where a church is erected for the use of a particular denomination, or religious persuasion, a majority of the members of the church cannot abandon the tenets and doctrine of the denomination, and retain the right to the use of the property; but such secessionists forfeit all right to the property, even if a single member adheres to the original faith and doctrine of the church.

This rule is founded in reason and justice. Church property is rarely paid for by those alone who worship there, and those who contribute to its purchase or erection are presumed to do so with reference to a particular form of worship, or to promote the promulgation or teaching of particular doctrines or tenets of religion, which, in their estimation, tend most to the salvation of souls; and to pervert the property to another purpose, is an injustice of the same character as the application of other trust property to purposes other than those designed by the donor. Hence it is, that those who adhere to the original tenets and doctrines, for the promulgation of which a church has been erected, are the sole beneficiaries designed by the donors; and those who depart from and

[1] See Watson v. Avery, 2 Bush (Ky.), 332.

[2] Vasconcellos v. Ferraria, 27 Ill., 237.

[3] Ferraria v. Vasconcellas, 31 Ill., 25; Smith v. Swormstedt, 16 How, 288; Brooke v. Shacklett, 13 Gratt (Va.), 301.

abandon these tenets and doctrines, cease to be beneficiaries, and forfeit all claim to the title and use of such property.

These are the principles on which the decisions are founded.[1]

§ 158. Same subject continued. The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws and principles which were accepted among them, before the dispute began, are the standard for determining which party is right.[2]

An organized church cannot be divested of its property, even though a majority of its members enter into a new organization which adopts the name of the original church, provided the old organization still exists.[3]

While two parties in a congregation were trying to get possession of the church property, and their disputes were under the scrutiny of the synod of the church, the court directed each party alternately to have the weekly use of such church property.[4]

Where a schism occurs in an ecclesiastical organization, which leads to a separation into distinct and conflicting bodies, the respective claims of such bodies to the control of the property belonging to the organization must be determined by the ecclesiastical laws, usages, customs, principles and practices which were accepted and adopted by the organization before the division took place.

Where the local congregation, which is itself a member of a much larger and more important religious organization, and is under its government and control, divides into two separate and conflicting bodies, and one of these bodies, to the exclusion of the other, is recognized by the proper superior body as constituting the true congregation, the decision of the proper superior body in that respect, when established as a

[1] Ferraria v. Vasconcellos, *supra;* Winebrenner v. Colder, 43 Pa. St., 244; Baker *et al* v. Fales. 16 Mass., 488; Stebbins v. Jennings, 10 Pick. (Mass.), 172; Sawyer v. Baldwin, 11 Pick. (Mass.), 495; Skilton v. Webster, Brightly's Rep'ts. (Pa.), 203; Dublin case, 38 N. H., 459; Lewis v. Watson, 4 Bush. (Ky.), 228; Gibson v. Armstrong, 7 B. Monroe (Ky.), 481, criticised in Ferraria v. Vasconcellos, *supra;* Den v. Bolton, 12 N. J. L. 206; Reform Church v. Theological Seminary, 4 N. J. Eq. 77; Methodist Church v. Wood, 5 Ohio, 283; Hadden v. Chorn, 8 B. Mon. (Ky.), 70; Deaderick v. Lampson, 11 Heisk (Tenn.), 523.

[2] McGinnis v. Watson, 41 Pa. St. 9.

[3] Venable v. Coffman, 2 W. Va. 310; Harper v. Straus, 14 B. Mon. (Ky.) 48.

[4] Bowden v. McLeod, 1 Edw. Ch. (N. Y.) 588; See Curd v. Wallace, 7 Dana (Ky.) 190; where court divided the use of the church.

fact, is binding upon the civil courts as regards questions of property arising out of the division between such separate and conflicting bodies.[1]

A seceding minority of a church, while, in good faith, in possession of the church building, placed repairs upon it which were necessary, and it was held that they had a good claim for the value of the improvements, which should be paid by the majority, as a condition to the exclusive use of the house by the latter.[2]

In case of a division of a religious corporation, both parties still adhering to the tenets and discipline of the organization, the property should be divided between them, in proportion to their numbers at the time of such separation.

In making partition of the property of a religious corporation, in case of division, mathematical nicety is neither attainable nor important. The only satisfactory mode is to count church members, by virtue of their membership, and, in addition, to count all pew holders, as members of the congregation.[3]

§ 159. Property and trusts of religious societies. Rights of property, or of contract, of religious organizations, are under the protection of the law, and the actions of their members are subject to its restraints.

Where a church is of a strictly congregational, or independent organization, and the property held by it has no trust attached to it, its right to the use of the property must be determined by the ordinary principles which govern voluntary associations.[4]

A charitable bequest to an unincorporated religious society is not invalid, by reason of its being composed, to a great extent, of persons not resident within the state. Nor is such bequest void, because given simply to an unincorporated association, and not for any specified charitable use.[5]

[1] White Lick Quar. Meeting v. White Lick etc., 89 Ind. 136; Watson v. Jones, 80 U. S. 679; Gaff v. Greer, 88 Ind. 122. In these cases the authorities are reviewed at great length and among those which are cited upon the above and kindred propositions are the following:

Harrison v. Hoyle, 24 Ohio St. 254; Chase v. Cheney, 58 Ill. 509; Church v. Witherell, 3 Paige 296; Lawyer v. Chipperly, 7 Paige 281; Watkins v. Wilcox, 66 N. Y. 654; Church v. Seibert, 3 Pa. St. 282; Harmon v. Dreher, 1 Speer's Eq. 87; Smith v. Nelson, 18 Vt. 511; Bowden v. McLeod, 1 Edw. Ch. (N. Y.) 588; Roshi's Appeal, 69 Pa. St. 462.

[2] Hadden v. Chorn, 8 B. Monroe (Ky.) 70.

[3] Niccolls v. Rugg, 47 Ill. 47; Hale v. Everett, 53 N. H. 9.

[4] Watson v. Jones, 80 U. S. 679.

[5] Evangelical Ass'n, Appeal, 35 Pa. St. 316; Banks v. Phelan, 4 Barb. (N. Y.) 80.

The religious tenets of a donor in trust to a religious corporation may be shown, as well as other circumstances, to aid in the construction of ambiguous provisions.[1]

Where a religious society purchases land, and the title vests in it in fee, as a corporation, the majority of the society has a right to control its use and occupation. They cannot be deprived of this right by any supposed error of doctrine. It is incident to the very nature of such corporation to hold such property at the will of a majority, if the charter of incorporation does not otherwise provide. They may occupy and manage such property as they please, so long as they admit the minority to the same benefits as themselves.[2]

Individuals may dedicate property, by way of trust, to the purpose of sustaining and propagating definite religious doctrines, and it is the duty of the court to see that the property so dedicated is not diverted from such trust. It is not in the power of the majority of a congregation to carry the property so confided to them to the support of a new and conflicting doctrine.[3]

Where a fund is bequeathed to an ecclesiastical society, the interest of which is to be applied for the purpose of maintaining a free school in one of the districts, an agreement by the society to apply the fund to the support of the ministry is a fraud on third persons, and void.[4]

A court of equity will not interfere to prevent the misuse or abuse of a trust of a religious nature, unless there is a real and substantial departure from the purposes of the trust, which amounts to a perversion of it.[5]

§ **160. Same subject continued.** An eleemosynary charity is, in the general scope of its benevolence, essentially unsectarian, and can only be made sectarian by having such limitations and restrictions placed upon it by the donor as make it so.

The mere making of an ecclesiastical organization trustee for an ordinary eleemosynary charity, does not of itself give a sectarian character to the charity, and if no limitations or restrictions are imposed to the contrary, the ecclesiastical body may continue in possession of the charity as its

[1] Kinskern v. Lutheran Churches, 1 Sand. Ch. (N. Y.) 439.

[2] Keyser v. Stansifer, 6 Oh. 363; Calkins v. Cheney, 92 Ill. 463.

[3] Watson v. Jones, 80 U. S. 679; White Lick etc. v. White Lick etc. 89 Ind. 136.

[4] Bailey v. Lewis 3 Day (Conn.) 450.

[5] Happy v. Morton, 33 Ill. 398.

trustee so long as it continues to be essentially and characteristically the same organization, without reference to changes or modifications which it may make in matters of mere detail, or of relatively subordinate importance, connected with its faith, doctrine and practices.[1]

When a society, of a particular religious sect or denomination, is formed with a strictly sectarian or denominational name descriptive of the fundamental doctrines of the sect to which it belongs, the presumption is that it was constituted for the purpose of promoting the vital and fundamental doctrines of such sect or denomination. In such cases, where a conveyance is made to, or a trust created for the benefit or use of such religious society, by its denominational name, with no other particular designation in the deed of the tenets or doctrines which it is to be used to advance and support, the denominational name may be a sufficient guide as to the nature of the trust, so far as respects doctrines which are admitted to be fundamental. And in such case, those having control of property held in trust for the benefit of such religious society may be restrained from applying the property, or the use of it, to the promotion of religious tenets and doctrines clearly opposed and adverse to the fundamental doctrines and faith of such sect or denomination at the time, and immediately after, such trust was created.[2]

Where the original trustees appointed by the founders of a religious charity or trust, applied the fund to the support of certain religious doctrines, and that application has been long continued, and has always been acquiesced in by the founders of the charity or trust, a court of equity will not permit such application to be changed or interfered with, unless such change is clearly required by the plainly expressed intention of the donor.[3]

The majority in a religious association, not incorporated, have supreme control and direction of the use of the church property, as respects all matters not determined by the articles of association of the particular society, the organization and discipline of the denomination to which it belongs, or the trust under which the property may have been conveyed; and the minority cannot, by procuring a charter of incorporation,

[1] White Lick, etc. v. White Lick, etc., 89 Ind. 136; Attorney General v. Moore, 19 N. J. Eq. 503; Watkins v. Wilcox, 66 N. Y. 654.

[2] Hale v. Everett, 53 N. H. 9.

[3] Hale v. Everett, *supra*.

acquire the right to the management of the property in opposition to the will of the majority of those interested.[1]

§ 161. **Trustees — officers.** There is one principle common to the trustees of all incorporated churches. They have the possession and custody of the temporalities of the church. They are considered, *virtute officii*, entitled to the possession, and are lawfully seized of the grounds, buildings, and other property belonging to the church. Though they hold the church property in trust for the congregation, still it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion made against their will, whether by the pastor, members of the congregation or by strangers.[2]

A court of chancery has jurisdiction to compel the persons having charge of the temporalities of a church, incorporated or otherwise, to the faithful performance of their trust, and also to prevent the diversion of the property from its original purpose.[3]

Where the trustees of a church corporation executed a mortgage on the church property to secure a legitimate debt, it was held that there was no equity in refusing to enforce the mortgage, under color of protecting a charitable use.[4]

A court has jurisdiction to compel the trustees of a church, who have violated their trust by appropriating the funds to the propagation of doctrines differing from the legitimate doctrines of the church, to deliver up the church property to other trustees of the church, who will properly apply them, and who have been duly elected by those entitled to elect trustees.[5]

A court of equity will entertain jurisdiction to compel the trustees of a church to permit clergymen who adhere to the principles of the church, to minister to the congregation in the church edifice, without regard to the comparative numbers of the respective parties in the congregation.[6]

Whenever the trustees of a religious society organized under the general law concerning its incorporation, do any act which obstructs the enjoyment of the property for the purposes and in the mode authorized by the usages of the church

[1] Henry v. Deitrich, 84 Pa. St. 286.

[2] German etc. Congregation v. Presler, 17. La. Am. 127.

[3] Bowden v. McLeod, 1 Edwards Ch. (N. Y.) 588; Wilson v. Island Church, 2 Rich. (S. C.) Eq. 192.

[4] Magie v. German etc. Church, 13 N. J. Eq. 77.

[5] Gable v. Miller, 10 Paige (N.Y.) 627; Watson v. Jones, 80 U. S. 679.

[6] Skilton v. Webster, Brightly's Reports (Pa) 203.

as an organized body, they are guilty of a violation of that trust, which will be corrected by a court of chancery.

A trust of this character is not distinguishable, in this, from any other trust over which courts of chancery exercise a supervisory power.[1]

Trustees are seized for the use of the body; and each member of the church becomes entitled to a beneficial interest in the property of the church, so long as his or her connection or membership continues. All the members of the body become beneficiaries in such property in an equal degree, notwithstanding some of them may have contributed a larger sum than others towards the common property.[2]

Aliens may be trustees and incorporators in a religious corporation.[3]

The court has no authority to control the discretion of trustees of a church in the management of its funds, so long as they do not violate their charter; they are responsible to their constituents alone.[4]

A majority of the members of the church cannot control the action of the trustees, in regard to its property, against the usage and rules of the organization.[5]

[1] Brunnenmeyer v. Buhre, 32 Ill. 183.

[2] Brunnenmeyer v. Buhre, 32 Ill. 183; Ferraria v. Vasconcellos, 31 Ill. 25.

[3] Cammeyer v. United German Church, 2 Sand. Ch. N. Y. 186.

[4] Wardens, etc., v. Barksdale, 1 Strobh. (S. C.), Eq. 197.

[5] Brunnenmeyer v. Buhre, 32 Ill. 183; People v. Steele, 2 Barb. (N. Y.), 397.

PART II.

The Law of Mutual Benefit Insurance.

CHAPTER IX.

Mutual Benefit Societies.

Sec. 162. Introductory.
Sec. 163. }
Sec. 164. } Their object is insurance, not benevolence.
Sec. 165. Rights of members of a mutual benefit society.

Sec. 162. Introductory. Life insurance did not become a business of importance in England until about the commencement of the present century. In this country, the contract of life insurance met with little favor for many years later. The wonderful development of the life insurance business, of which evidences are seen upon every side, has taken place within forty years. Mutual benefit insurance is of even more recent growth. There is probably no mutual benefit society in this country, to-day, whose organization took place more than thirty years ago; there are few that have been in existence for fifteen years; and by far the greater part of those now in existence have been organized within the past twelve years.

At a recent meeting of representatives of mutual benefit societies, it was estimated that, at the end of the year 1886, there were twelve hundred societies doing a mutual assessment life insurance business in this country, having a total membership of at least two million members, carrying $4,500,000,000.00 of insurance; that the total amount collected on assessments, dues, etc., was $40,000,000 for that year; that the expenses amounted to $6,000,000, and benefit funds paid on account of the death of sixteen thousand members amounted to $30,000,000, leaving a surplus of $4,000,000

on that year's business to be carried to reserve funds. These results were arrived at from the statements made by four hundred and sixty-two societies, in which number is included all the principal societies in this country, and from estimates made from a general knowledge of the other societies.

For the purposes of this work, it is immaterial whether this statement is even approximately correct. Suffice it to say, that mutual benefit insurance has grown in popular favor, until at the present time many hundred thousands of persons are carrying such insurance, for the benefit of those for whom it is their duty and their pleasure to provide; that the courts of every state are frequently called upon to determine the rights of parties under such contracts of insurance, and that the rights of members and their beneficiaries, under contracts entered into for such worthy and commendable objects, are entitled to the tender and intelligent consideration of courts.

The advocates of mutual assessment insurance claim for their plan many virtues and many advantages over all other modes of life insurance. But on the other hand, the advocates of ordinary life insurance are bitter in their denunciations of mutual benefit societies. This work has nothing to do with this controversy. It is not the province of the writer on the legal aspect of such societies and their contracts, to discuss the merits of the different plans of life insurance. It is enough that such societies exist, and are recognized in statutes and courts, as a feature of the insurance business of the country.

The standing in court given to these societies by the courts of the land, is well expressed by the Supreme Court of Ohio in The State *ex rel.* v. The Standard Life Association, 38 Ohio St. 281, where it is said:

"It does not fall within the province of the court to discuss the relative merits of the different plans of life insurance, as between the old line systems and those formed on the co-operative or mutual assessment plan. It is enough to know that the statutes of Ohio authorize each plan, and each, doubtless, has its merits if properly administered, and demerits if not. Whatever be the system, it is the highest duty of the courts to see that the trust is faithfully administered. This is especially true in the co-operative or mutual assessment plan, where there is no reserve or surplus fund, and where the assessments to pay benefits are collected directly from the members, who generally do not understand the mysteries of life insurance management. These associations doubtless had their origin in the friendly and benevolent organizations and fraternities

claiming like affiliation and purpose. These and other organizations, having for their object the mutual aid, benefit and relief of their members, or their families or heirs, when honestly and economically administered as a sacred trust, and not with a view to profit, are worthy the protection of law."

§ 163. Their object is insurance, not benevolence. History tells us that the origin of life insurance is traceable to benevolent motives. The object of such insurance was to provide a fund for the widows and orphans of a person whose income ceased with his life; and such an object was certainly benevolent. But whatever may be the motive underlying the great scheme of life insurance, it is certain that, in its practical application, life insurance is, and must be, founded upon contract. Its benevolence must flow, not from mere good will, but from legal obligation. Its gifts must not depend upon the continuance of the charitable impulses of those who shall pay, but upon mutual promises.

Although the object of the insurer in making the contract, and the objects of the organization with which he contracts are benevolent and not speculative, they have no bearing upon the nature and effect of the business conducted, and the conract so made. Nor will the character of the contract be changed by the fact that the organization issuing it designates itself as a benevolent or charitable society, instead of an insurance company. The name of the society will not necessarily fix or establish its real character.

If the prevalent purpose and nature of an association, of whatever name, be that of insurance, its legal character will not be changed by the benevolent or charitable results to its beneficiaries.

A society which by contract agrees to pay to the beneficiary of a deceased member a sum of money, is a mutual insurance company, whatever may be the terms of payment of the consideration by the member, or the mode of payment of the sum to be paid in the event of his death.[1]

[1] Commonwealth v. Wetherbee, 105 Mass 161; State *ex rel.* v. Benevolent Society, 72 Mo. 146; State *ex-rel.* v. Benefit Association, 6 Mo. App. 172; State *ex rel.* v. Brawner, 15 Mo. App. 597; Bolton v. Bolton, 73 Me. 299; Schunk v. Gegenseitiger etc. Fund, 44 Wis. 370; Erdmann v. Mutual etc. 44 Wis. 376; Dietrich v. Madison Relief Association, 45 Wis. 79; Mason's Benevolent Society v. Winthrop, 85 Ill. 537; Illinois Mason's etc. v. Baldwin, 86 Ill. 479; Farmer v. State *ex rel.* Texas; 7 S. W. Rep. 220; Supreme Commandery v. Ainsworth, 71 Ala. 436; Sherman v. Commonwealth, 82 Ky. 102; 5 Ky. Law Rep. 874; State v. Vigilant Ins. Co, 30 Kan. 585; State v. N. W. Mutual etc., 16 Neb. 549; State v. Mutual Ben. Association 18 Neb. 276.

The leading case upon this subject is Commonwealth v. Wetherbee, 105 Mass. 160, wherein the court says:

"A contract of insurance is an agreement, by which one party, for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance, the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case, neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by the contingency contemplated in the contract. The contract made between the Connecticut Mutual Benefit Company and each of its members, by the certificates of membership issued according to its charter, does not differ in any essential particular of form or substance from an ordinary policy of mutual life insurance. The subject insured is the life of the member. The risk insured is death from any cause not excepted in the terms of the contract. The assured pays a sum fixed by the directors and not exceeding ten dollars, at the inception of the contract, and assessments of two dollars each annually, and of one dollar each upon the death of any member of the division to which he belongs, during the continuance of the risk. In case of the death of the assured by a peril insured against, the company absolutely promises to pay to his representatives, in sixty days after receiving satisfactory notice and proof of his death, "as many dollars as there are members in" the same division, the number of which is limited to five thousand. The payment of this sum is subject to no contingency but the insolvency of the corporation. The means of paying it are derived from the assessments collected upon his death from other members; from the money received upon issuing other certificates of membership, which the by-laws declare may, after payment of expenses, be 'used to cover losses caused by the delinquencies of members,' and from the guaranty fund of one hundred thousand dollars, established by the corporation under its charter.

This is not the less a contract of mutual insurance upon the life of the assured, because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of non-payment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by the assured, and all dividends and credits accrued to him, to be forfeited to the company."

A corporation with salaried officers, paying commissions on risks obtained, insuring and admitting to membership anyone having the requisite conditions of age and health, and requiring no other qualification for membership, cannot evade the insurance laws by calling itself a benevolent society and obtaining a charter as such.[1]

The law will, when occasion requires, look behind the names of societies, and pass its judgment upon their schemes and modes of business.[2]

In discussing the subject of mutual assessment insurance courts have intimated that there is possibly a distinction between a society, the primary object of which is to contract with its members for the insurance of their lives, and a society organized for a social, literary, or benevolent purpose, to which a feature of mutual insurance is added for the purpose of mutual aid.[3]

The distinction amounts to this, that while the contract is one of mutual life insurance, the societies having the feature of mutual aid, cannot be said to be carrying on a general business of mutual life insurance. There is, however, no case in which it has been held that such a society is not an insurance company within the meaning of the statutes regulating insurance companies, except where such society was chartered under special laws providing for the incorporation of such societies.

§ 164. Same subject continued. The payment of the benefit fund by a mutual benefit society to the beneficiary,

[1] State v. Citizens' Benefit Association, 6 Mo. App. 163.

[2] Governors' etc., v. Am. Art Union, 7 N Y. 228; State *ex rel.* v. Graham, 66 Iowa 26.

[3] Durian v. Central Verian etc. 7 Daly 168; Barbaro v. Occidental Grove, 4 Mo. App. 429; State *ex rel.* v. Benefit Association 6 Mo. App. 172; Swift v. San Francisco Board etc. 67 Cal. 567.

or payment of a "sick benefit," or "permanent disability indemnity" by the society to a member, is not voluntary, and in the nature of a gift, but is the fulfillment of a contract of insurance entered into by the member and the society.[1]

A contract by a society to pay, at certain stated periods of time, certain sums of money as endowments to living members, or, in case of their death, to pay certain other sums of money as benefits to their beneficiaries, is life insurance, both as to the endowment and the benefit.[2]

A mutual benefit society incorporated under special laws, is governed by the law under which it is incorporated, and by the law relating to corporations, but, in carrying on its business of mutual assessment insurance, it is not subject to the statutes of the state, relating to life insurance and life insurance companies.[3]

Mutual benefit societies are subject to the application of those legal principles applicable to other mutual life insurance companies.[4]

§ 165. Rights of members in mutual benefit societies. The rights of a member of a mutual benefit society are two-fold — those which arise out of the contract of membership, and those which arise under his contract for benefits.

In seeking to determine the rights of a member of such a society, it is necessary, therefore, to determine under which contract they arise.

The corporate rights of a member of a mutual benefit society are subject to the control of the corporation; but his rights as an insured person rest upon his contract with the society.[5]

[1] Bolton v. Bolton, 73 Me. 299.

[2] Endowment & Benevolent Association v. State, 35 Kan. 253; State v. Mutual Aid Association, 35 Kan. 51: 9 Pac. Rep. 956.

[3] State *ex rel.* v. The Mutual Protection Association, 26 Oh. St. 19; State v. Iowa Mutual Aid Association, 59 Iowa 125; 12 N. W. Rep. 782; Supreme Council v. Fairman, 62 How. Pr. 386.

[4] Erdmann v. Order of Herman's Sons, 44 Wis. 376.

[5] Bradfield v. Union Mutual etc. 9 Weekly Notes of Cases (Pa.) 436; Rosenberger v. Washington Mutual etc., 87 Pa. St. 207.

CHAPTER X.

Certificate of Membership.

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Sec. 166. Certificate of membership — generally. The certificate of membership in a mutual benefit society is a part of the written evidence of the contract of insurance.

An ordinary life insurance policy contains the whole contract of insurance.[1]

In mutual benefit societies, the charter, constitution and by-laws in force at the time of the admission of a member are a part of the contract of insurance, whether they are referred to in the certificate of membership or not.[2]

The provisions of the charter, constitution and by-laws, so far as they relate to this contract, cannot be altered so as to effect it, without the consent of the assured member.[3]

But an amendment to the by-laws of a mutual benefit society merely for the purpose of regulating its mode of transacting its business, and adding no new condition to contracts of insurance already issued, is binding on the assured.[4]

While it is only existing by-laws of a mutual benefit society which are presumed to be known, and in reference to which

[1] Union Mutual etc. v. Mowry, 96 U. S. 544.

[2] Supreme Commandery etc. v. Ainsworth, 71 Ala. 436; Simeral v. Dubuque Mutual etc., 18 Iowa 322.

[3] Morrison v. Wisconsin Odd Fellows etc., 59 Wis. 162: 18 N. W. Rep. 13; Gundlach v. Germania Mechanics Assn., 49 How. Pr. 190; Pulford v. Fire Department of Detroit, 31 Mich. 458; Becker v. Farmers' Mutual etc., 48 Mich. 610; Bradfield v. Union Mutual etc., 9 Weekly Notes of Cases (Pa.) 436.

[4] Georgia Masonic Mutual etc., v. Gibson, 52 Ga. 640; Walsh v. Ætna etc. Co., 30 Iowa 145; Treadway v. Hamilton, 29 Conn. 68.

it is presumed that contracts of insurance are made; and while it is true that a society has not the power, by laws of its own enactment, to disturb or divest rights which it had created, or to impair the obligations of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations; yet, parties may contract with societies in reference to laws of future enactment, and may agree to be bound and affected, as they would be bound and effected if such laws were existing; and they may thereby consent that such laws may enter into, and form part of their contracts, modifying or varying them.

Where a contract of insurance is issued, conditioned that it shall be subject to such by-laws as may thereafter be enacted by the society, by-laws subsequently passed become a part of the contract.[1]

Where, for instance, a certificate is silent as to the consequence, if the member should die by his own hand, but recites that any violation of the "requirements of the law now in force, or hereafter enacted, governing the order, or this class, shall render this certificate null and void," and that a condition upon which its obligation depends is "the full compliance with all the laws of the order now in force, or that may hereafter be enacted"; and it issued, and was accepted by the assured in writing "subject to the laws of the order now in force, or which may hereafter be enacted by the Supreme Commandery"; and at the time it was issued, there was a general law of the society rendering it a condition upon which a certificate could issue, and upon which its benefits could be realized, that the member to whom, or upon whose life it was issued, should comply with the "general laws of the order then in existence, or which might thereafter be enacted"; but the by-laws contained no provision declaring an avoidance or forfeiture of the certificate in the event the member should die by his own hands, it was held that, by force of the recitals, stipulations and provisions above noted, a by-law, enacted by the society after the certificate was issued and accepted, providing that a certificate of this class should be forfeited if the member, whether sane or insane, should take his own life, entered into and formed a part of the certificate, avoiding it in the event the member, whether sane or insane, should take his own life.[2]

[1] Supreme Commandery, etc., v. Ainsworth, 71 Ala., 436.

[2] Supreme Commandery v. Ainsworth, *supra*.

§ **166 a.** In some societies, the issue of certificates of membership, as a part of the contract of insurance, is not contemplated. The charter, constitution and by-laws, contain the plan of insurance, designate who shall be beneficiaries of its members, and the order in which they shall take, or provide for registration of beneficiaries on the books of the society, and constitute the whole contract of insurance.[1]

In such cases, membership in the society carries with it a specified amount of life insurance.

The certificate of membership is, in any event, a mere fragment of the contract, and, it may be said, without much extravagance of expression, that whatever vitality it possesses, is derived from the charter, constitution and by-laws of the society.

The certificate of membership may, however, be necessary to the contract of insurance. Where the charter of a society provided that the beneficiary should be designated in the manner to be pointed out in the by-laws, and the by-laws provided that the benefit fund should be payable to the person designated in the certificate of membership, it was held that the failure of a member to take out a certificate of membership was fatal to the contract of insurance, and that the society was not liable to any one for the benefit fund.[2]

In societies where the certificates are not contracts with the beneficiaries, the laws, rules and regulations in regard to beneficiaries may be changed during the continuance of the certificates, so as to limit and abridge their interests; and such limitations are not subject to objection as impairing vested rights, or the obligation of contracts.[3]

Where the constitution of a mutual benefit society provides that its by-laws may be amended at any time, a beneficiary in a benefit certificate, who is not a member of the society, cannot complain that a by-law in existence at the time the certificate was issued, providing that the member may surrender the certificate, and receive a new one, with the consent of the beneficiary, was amended so as to omit the consent of the beneficiary. The beneficiary has no vested rights in such certificate, not being a party to the contract; nor can such beneficiary recover on the original certificate, it having been surrendered, and a new one issued.[4]

[1] Baldwin v. Golden Star Fraternity, 47 N. J. L., 111.

[2] Bishop v. Grand Lodge, 43 Hun (N.Y.), 472, 26 N. Y. Weekly Dig. 166.

[3] Durian v. Central Verein, 7 Daly (N. Y.), 168.

[4] Byrne v. Casey, Texas, 8 S. W. Rep., 38.

§ **167. Same subject continued.** A person accepting directly, or by assignment from the assured member, a certificate of membership in a mutual benefit society, declaring that its constitution, by-laws, and conditions of association are a part thereof, is bound by the by-laws and constitution. He is not justified in supposing that, because each of the conditions annexed to the policy refers to a by-law, the by-laws contain no further conditions.[1]

It may be laid down as the settled law in fire insurance that a contract of insurance is complete when the insurer offers to insure on certain terms, and the offer is accepted by the applicant, and that the contract need not be in writing unless the law expressly requires it.[2]

These principles have been held to apply in mutual benefit societies, in cases where the charter and by-laws contain the whole contract of insurance, and where there is no provision that the contract must be in writing.[3]

When an accepted applicant for membership pays his membership fee, and promises in his written application to pay the further sum of one dollar and ten cents whenever any other member dies, or forfeit his claim to a benefit; and the by-laws provide that the association, within thirty days after satisfactory proof of his death, will pay to his "widow" as many dollars, not exceeding one thousand, as there are surviving members at the time of the death, the contract is completed, and is one of life insurance.

The text books, as well as the opinions of various courts, contain definitions of the contract of insurance, as it is applied to its various subjects; and although differently expressed, they all concur as to its substantive elements, that all that is essential to such a contract is the payment of a consideration by one party, and the promise of the other to pay an agreed amount upon the happening of the contingency specified in the contract, it being understood that the former party had an insurable interest in the subject matter insured[4]

§ **168. Where executed.** Generally speaking, the validity of a contract is to be decided by the law of the place

[1] Miller v. Assurance Association, 42 N. J. Eq. 459; 7 Atl. Rep. 895.

[2] May on Insurance Sec. 14-24; Ins. Co. v. Colt, 20 Wall. 560.

[3] Oliver v. Am. L. of Honor, 10 Pac. Coast Journal 481. See Sec.169.

[4] Bolton v. Bolton, 73 Me. 299; Elkhart Mutual Aid etc. v. Houghton, 98 Ind. 149.

where it is made, and if valid or void there, it is valid or void everywhere.[1]

In Reimsdyk v. Kane *et al.*, 1 Gallison 374, Judge Story says the rule is well settled "that the law of the place where a contract is made is to govern as to the nature, validity and construction of such contract" unless it shall appear from the tenor of such contract, it was entered into with a view to the laws of some other state.[2]

Huberus, in his *De Conflictu Legum*, Vol. 2, book 1 tit. 3, says:

"The general rule is that contracts are to be interpreted according to the laws of the country where they are made, but if, from the terms or nature of the contract, it appears it was to be executed in a foreign country, or that the parties had respect to the laws of another county, then the place of making the contract becomes immaterial, and the obligation must be tested by the laws of the country where the duty was to be performed."

A policy issued from the office of a society in Wisconsin was held to have been executed in Oregon, because the policy required that it should be countersigned by the agent in Oregon, before it should be valid and binding.[3]

In Hyde v. Goodnow, 3 N. Y. 269, under the provisions of the application and policy, which contained the stipulation that it should not be binding until the application and premium note were deposited in the office of the company and approved by its directors, it was held that when the application was approved and the policy deposited in the mail at the place of the company's office, addressed to the defendent, the contract was then and thereby executed, and became binding on the parties thereto.[4]

§ **169. When executed.** A certificate of membership is void as a policy of insurance if executed by the society after the death of the assured, and in ignorance of that fact.[5]

[1] There are a few exceptions to this rule.

[2] Fitch v. Remer, 1 Biss. 337.

[3] N. W. Mutual etc. v. Elliott *et al.* 5 Fed. Rep. 225; See also Pomeroy v. Insurance Co., 40 Ill. 400; Thwing v. Insurance Co., 111 Mass. 109; Hardie v. Insurance Co., 26 La. An. 242; Insurance Co., v. Kennedy, 6 Bush. 450; Giddings v. Ins. Co., 102 U. S. 108.

[4] See Yonge v. Equitable Life etc. 30 Fed. Rep. 902.

[5] Giddings v. N. W. Mutual, etc., 102 U. S., 108; Insurance Co. v. Ewing, 92 U. S., 377; Insurance Co. v. Young, 90 U. S., 152; Markey v. Ins. Co., 103 Mass. 92; Ins. Co v. Kennedy, 6 Bush., 450; Ins. Co. v. Willets, 24 Mich., 268; Misselhorn v. Mutual Reserve, etc., 30 Fed. Rep., 545.

In Yonge v. Equitable Life, etc., 30 Fed. Rep. 902, a policy of insurance was held valid and binding although it was never actually delivered into the possession of the applicant.[1]

A member of a local council in California sent his application for insurance to the Supreme Court of American Legion of Honor at Boston, Mass. The application was returned to the local council for correction of a clerical irregularity in the certificate of the medical examiner. The irregularity was corrected, and the application again sent to the supreme council. It was never received at the office of the supreme council, and no certificate was ever issued to the member. The secretary of the local council wrote several times to the secretary of the supreme council, making inquiries about the application, but received no answer. The member soon afterward died.

From the time of sending on his application, he was treated as a beneficiary member by the local council, and was called on to pay assessments as other beneficiary members. He paid three assessments, all that were levied, and the money was forwarded to the supreme secretary. The money was received without objection, and no notification was ever given that he was not considered a beneficiary member by the supreme council until after his death.

A by-law of the society provided: "Applicants will not be subject to assessments or entitled to benefits until their examinations are approved, but will become beneficiary members on the day of the approval by the medical examiner in chief, and they must be credited with their assessments on the date of approval, as above."

The Superior Court of San Francisco, in deciding the case, says:

"The certificate is not the contract. It is only evidence of it. The medical examiner-in-chief has no right to arbitrarily reject an application made in good faith, and after compliance with the requirements of defendant. He has no power to change the by-laws. He is merely an executive officer, authorized to see that applicants are qualified. In this case it is conceded that the applicant was qualified in every respect. It was the duty of the examiner in chief to approve the application. 'That which ought to have been done is to be regarded as

[1] See May on Ins., pages 64–71, 526; Fried v. Royal Ins. Co., 50 N. Y., 243.

done, in favor of him to whom and against him from whom performance is due.' This is a favorite maxim of the law."[1]

§ 169a. Delay of society in issuing certificate. In Misselhorn v. Mutual Reserve, etc., 30 Fed. Rep., 545, Judge Brewer says: "While receipt of the application may cast a moral duty upon the company to act promptly, yet delay does not operate in the same way as an acceptance of the application. Suppose the company had delayed acting for a year, could it be claimed that the policy was in force? The proposition which the applicant made was for a policy to become operative when the instrument was executed and delivered. No negligence, no delay, reasonable or unreasonable, on the part of the insurance company, could make a contract in face of the stipulation."[2]

Where a person made application for insurance, and the application set out that the policy would not take effect until the membership fee was paid, but the agent of the society told the applicant that he could pay the fee either at that time, or when the policy was delivered, and the applicant elected to pay at the latter time, but died before the policy was received, it was held that the policy never took effect, and the insurer was not liable.[3]

§ 170. Delivery of certificate to member. Delivery of a certificate to an agent of the society for delivery to a member is a completed delivery, although the agent never in fact delivered it.

A supreme lodge executed a certificate of membership and sent it to a subordinate lodge to be countersigned by the subordinate lodge, as required by the by-laws, and delivered to the member. It was not countersigned or delivered to the member, but was in the custody of the subordinate lodge when the member died.

The question for the court to decide was, whether the certificate was so far perfected, in accordance with the laws of the order, as to entitle the beneficiary to recover the fund.

The court said: "It is manifest that the only object of the countersigning would be to show that the certificate had

[1] Oliver v. Am L., of Honor, 10 P. C. L. Journal, 481; Am. L. Rev, 1883, p. 301.

[2] See Kohen v. Mutual Reserve, etc., 28 Fed. Rep., 705; K. and L. of Honor v. Grace, 60 Texas, 569.

[3] Ormond v. Fidelity Life Association, 96 N. C., 158; 1 S. E. Rep., 796. See chapter XIII.

reached the member by the regular channel. It was not intended and could not give additional force to the agreement of the supreme lodge to pay the money. It imposed no obligation or duty upon the subordinate lodge, nor did it in anyway indicate the direction or want of direction on the part of (the member). It was nothing more than the performance of a duty required by a principal from his agent, to show that the agent had performed a ministerial act. * * * Upon what principle should an accident which prevented countersigning and actual delivery to (the member) relieve the supreme lodge from the performance of their contract? Delivery to an agent for delivery to a party in interest is a completed delivery from the time the agent has received the instrument. The principal cannot take advantage of the failure of the agent to perform an act over which the party having the beneficial interest has no control."[1]

§ 171. Construction of contract of insurance. Ordinary policies of life insurance are held to be contracts between the company and the beneficiary named in it.

But unless special provisions of the charter, by-laws or certificate of membership require such a construction to be given to a contract of mutual benefit life insurance, it will be construed to be a contract between the society and the member insured.

The construction to be given to the contract of mutual benefit life insurance arises from the plan of insurance and the object of the societies. The benefit fund provided for is small, and is variously limited in the different societies at from one thousand to five thousand dollars. It is the theory of this plan of insurance that it is "the poor man's insurance,"—that it is given for exactly what it costs,—that there are no unnecessary expenses,—that the benefit fund shall go to the family and dependents of the member in such a manner as he may desire it to go, not only when he takes out the certificate, but at any time afterward when changes shall have taken place in his family; and it is designed that changes in the designation of those whom he shall desire to be the objects of his provision, may be made by the act of the member at any time, without other expense or formality than such as may be prescribed by the laws of the society issuing the contract of insurance.[2]

[1] Supreme Lodge K. of H., 12 Ins. Law Journal 628.

[2] See Designation of Beneficiary—Chapter XII, part 1.

As the contract of mutual benefit insurance is between the society and the member, it follows that a minor may not be admitted to membership, unless the organic law of the society expressly authorizes minors to become members.

The provisions of a life insurance policy are construed and applied like the terms of any other contract.[1]

A policy of life insurance, while not an evidence of debt for the absolute payment of money, is a chose in action governed by the principles applicable to other agreements involving pecuniary obligations.[2]

Certificates of membership in mutual benefit societies are, in effect, policies of life insurance, and, in most respects, are governed by the same rules which prevail in policies of insurance[3]

The stipulations of a written contract are not the less binding because made between a corporation and one of its members; nor are the rules of construction in such cases different from those which obtain in contracts between corporations and strangers.[4]

It has been frequently held that where parties have, by their own acts, placed a construction upon doubtful and ambiguous provisions of a contract of insurance, the courts will carry that construction into effect.[5]

But the construction given to any of the provisions of the contract of insurance by the officers of the society is not binding upon the courts, and the members cannot be bound by any acts that may have been done by them under such a construction.[6]

In Wiggin v. Knights of Pythias, *supra*, the court says:

"These words, of the by-laws become part of the contracts for life insurance, and, in the courts, must receive the ordinary interpretation put upon the contracts containing them. * * * * *

These benevolent associations or fraternities, not more than other parties to contracts, cannot be allowed to construe the words they use in making agreements otherwise than according to their plain and unambiguous meaning, in the English language they employ, whether the words of the contract itself or of the rules and regulations which become, by the prin-

[1] Conn. Mut etc. v. Pyle, Ohio. 4 N. E. Rep. 465.

[2] Hutson, v. Merrifield, 51 Ind. 24.

[3] Elkhart Mut. Aid etc. v. Houghton, 98 Ind. 149.

[4] Willcuts v. N. W. Mutual etc., 81 Ind. 300; New England Mutual etc. v. Butler, 34 Me. 451.

[5] Ins. Co. v. Dutcher *et al.* 95 U. S 269.

[6] Manson v. Grand Lodge etc. 30 Minn. 509. Wiggin v. Knights of Pythias, 31 Fed. Rep. 122.

ciples they insist on, embodied in the contract as a part of it. They cannot be permitted to interpret the contract as they please, and become their own judges of what they mean by the use of the words employed that have either a technical or well defined signification, known of all men who use the language. Legislatures and parliaments cannot do that, and even they are bound by the common meaning of the words they use in their statutes which become part of a contract."

The law governing the distribution of the benefit fund is to be found in the constitution, by-laws and certificates of the society, but when a dispute arises as to the interpretation of that law, the law of the domicil, and not that of the place where the property may chance to be, governs such interpretation.

§ 172. **Same subject continued.** The certificate and by-laws should be construed liberally, and with a view to effectuate the contract.

Where, in a certificate of membership, there are two inconsistent stipulations covering the same subject matter, the one general and providing, among other things, that upon certain conditions, the policy shall become absolutely void, and the other separate and distinct, and providing, upon the very same conditions, that the society may, by proper steps, avoid the policy, the latter stipulation will govern.

Thus, a specific stipulation in a separate clause of a certificate of membership, providing that if the assured shall become intemperate to a certain degree, the society may cancel the policy, and thus absolve itself from liability, will control a general stipulation that such a degree of intemperance shall work an absolute forfeiture.[1]

Where the certificate of membership, or by-laws contain inconsistent or contrary provisions, that construction or provision most favorable to the assured will be adopted.[2]

In Burkhard v. Travelers Ins. Co., 102 Pa. St. 262, it is said:

"When a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction."

[1] N. W. Mutual etc. v. Hazelett, 105 Ind 212; 4 N. E. Rep. 582.

[2] Supreme Lodge v. Abbott, 82 Ind. 1; National Bank v. Ins. Co. 95 U. S. 673.

§ **172a.** Only a stern legal necessity will induce such a construction as will nullify the contract of insurance.[1]

Where in the body of a certificate of membership, reference is made to the indorsements on the back, they may be considered in connection with the policy, in determining when the certificate is payable, where that is left doubtful in the body of the instrument.

Where such a certificate was endorsed: "Mutual assurance on the life of———Due at the death of members $1.00," and the body of the certificate contained expressions such as, should the assured "come to his death by the hands of the law" or "should die by suicide, or without heirs or assigns" only $50.00 should be paid, it was held that, taking into consideration these expressions, with the indorsements, the intention was manifest that the policy was to become due on the death of the assured.[2]

Questions of fraud, warranty, representation etc., belong equally to ordinary life insurance and mutual assessment life insurance, and the treatment of such questions is beyond the scope of this treatise.

§ **173. Same subject continued.** The by-laws of a benefit association provided that, upon the death of a member, and in order to make up the amount to be paid to his beneficiary, each member should pay one dollar, and that the beneficiary should be entitled to receive from the association the amount collected on the assessment levied therefor. In construing these by-laws, the court held that the beneficiary was only entitled to receive the amount actually collected on an assessment made for his benefit, and not a sum equal to one dollar from each member.[3]

In construing the following clause in a certificate of membership, "Peter Neskern, having complied with the conditions of membership, is entitled to the benefit of said association, in the sum of one dollar for each contributing member," the court held that "contributing members," and members in good and regular standing who had not forfeited their membership, were synonymous and convertible terms.[4]

[1] Franklin Life v. Wallace 93 Ind. 7; Bliss on Life Ins. at section 385.

[2] St. Clair Co. Ben. Soc. v. Fietsam, Adm'r 97 Ill. 474. See Hygum v. Ætna Ins. Co., 11 Iowa 21; Wright v. Mutual Benefit Association, 43 Hun (N. Y.) 61.

[3] *In re* La Solidarite Mut. Ben. Ass'n 68 Cal. 392.

[4] Neskern v. N. W. Endow. etc. Ass'n, 30 Minn. 406.

Provisions of the constitution and by-laws of a benevolent society, allowing benefits "in case of sickness," and providing that when "any member takes sick," he shall be entitled to benefits, "if it be so that he is not able to attend to his daily labor," do not extend to a case of permanent bodily injury, which does not effect the general health of the person injured.[1]

A member of such a society had his thigh bone broken, which caused a shortening of the leg and the eversion of the foot. For twenty-six weeks the society paid him his allowance of $5.00 per week, and at the expiration of that time, to-wit, on Oct. 8, 1877, refused to pay him any further weekly allowances. For about sixteen months he was able to do very little work, and could not perform the duties of a coachman, as he had done for years prior to his injury. On February 11, 1879, he brought suit for weekly benefits from Oct. 8, 1877.

The court held that he was not entitled to weekly benefits under the constitution and by-laws, as the incapacity to work, because of the effect of the injury, was not a sickness within their meaning.[2]

Insanity has always been regarded as a disease, and comes strictly within the meaning of the term "sickness." Where, therefore, by the laws of a society, benefits are promised on account of sickness, a member who has become insane is entitled to sick benefits.[3]

§ 174. "In good standing." In an action upon a certificate of membership for life insurance, reciting that the deceased is a "beneficiary member in good standing" in a benevolent association, and that, upon his death, a sum named will be paid, "provided he be in good standing when he dies," the certificate is proof of the good standing of the party named at the time it issued, and such standing will be presumed to have continued, in the absence of contrary evidence. In such case, the burden is on the society to show that by reason of his conduct, or his failure to comply with the regulations or requirements of the society, the deceased member had lost his good standing.[4]

Where the contract of insurance is issued upon the express condition that the member shall keep his pledge of total abstinence and comply with the laws of the society, and provides

[1] Kelly v. A. Order of Hibernians, 9 Daly 289.

[2] Kelly v. A. Order of Hibernians, *supra*.

[3] Burton v. Eyden, 8 Q. B. 295.

[4] Supreme Lodge v. Johnson, 78 Ind. 110; Mills v. Rebstock, 29 Minn. 380.

that if he die in good standing, his beneficiary shall be entitled to the benefit fund, the violation of the pledge of total abstinence alone forfeits the right of the beneficiary to recover the sum provided for. In such case it may be shown by parol that he violated his pledge, and the trial and conviction by the society for such violation need not be shown in order to defeat a recovery.[1]

Where the by-laws of an unincorporated society provide that a member shall forfeit his rights in the benefit fund in case he shall neglect his Easter duty of confession, he is not in good standing unless he regularly performs such duty; and his neglect of such duty may be shown in an action by the beneficiary on his certificate.[2]

Where the constitution and by-laws of an unincorporated mutual benefit society provide that its members shall pay dues and assessments for insurance according to a certain plan, and that each member shall be a communicant in the Roman Catholic church, and shall yearly go to confession to a priest of that church, and receive the holy communion, which provisions of the constitution and by-laws were well known to member at the time he entered into the contract of insurance, the member must not only pay his dues and assessments, in order to remain in good standing in the society, but must also perform his duty of confession and communion, or forfeit his rights under the contract.[3]

It was urged in this case that these provisions for yearly confession and communion were contrary to the constitution of the United States, and the constitution of the state of Kentucky, upon the subject of freedom of religious worship, but the court held that they were clearly legal and valid.

In People v. Benevolent Society, 24 How. Pr., 216, it is suggested in the opinion that provisions of a by-law requiring the practice of religious duties, such as confession and communion, according to the practice and teachings of any particular faith, as conditions of membership in an insurance society, are not obligatory upon members, because they are contrary to the provision of the constitution of the state of New York, Article I, Sec. 3: "The free exercise and enjoyment of religious profession and worship, without discrimina-

[1] Royal Templars v. Curd, 111 Ill. 284. Hogins v. Supreme Council, Cal.; 18 Pacific Rep. 125.

[2] Matt v. Society, Iowa; 30 N. W. Rep. 799.

[3] Hitter v. St. Aloysius Society Kentucky Court of Appeals, reported in Albany Law Journal, vol. 27, p. 431, but not reported in Kentucky Reports.

tion or preference, shall forever be allowed in this state to all mankind." But the decision is placed upon other grounds—that the proceedings of expulsion were invalid, and that a religious society could not be organized under the act providing for the incorporation of charitable and benevolent institutions.[1]

§ 175. Suicide. Where there is no condition in a contract of insurance, that it shall be void in case of the death of the member by suicide, and the member commits suicide, the society is liable to the beneficiary.[2]

In an action on a certificate of membership, if there be a doubt whether the death of the assured was the result of accident or of suicide, this doubt must be solved in favor of the theory of accident.

But if the plaintiff has, in her proof of death, stated that the death was by suicide, it is incumbent on her to satisfy the jury that she was mistaken in this statement, and that the death was caused by accident.[3]

Where the verdict of a coroner's jury, finding that the deceased had come to his death by suicide, was annexed to the proof of death, it was held that the burden was on the insurer to prove the suicide of the deceased.[4]

Where there is no evidence as to the cause of the death of the assured, the presumption is that it was from natural causes, and not an act of self-destruction.

But where the evidence is equally balanced as to whether the death was by suicide or not, it is error to instruct the jury that if the evidence leaves the matter in doubt, the presumption is that the death was produced by natural causes, and not by self-destruction.[5]

In the absence of evidence to the contrary, it will be presumed that death by drowning is the result of accident, and not of suicide.[6]

[1] The subject of the loss of good standing in a mutual benefit society arising from non-payment of assessments, is treated of in the chapter on "Assessments" under the head of "Suspension for non-payment."

[2] Mills v. Robstock, 29 Minn.; 13 N. W. Rep. 162; Fitch v. Ins. Co., 59 N. Y., 573; Patrick v. Ins. Co., 4 Hun, 263.

[3] Keels v. Mutual, etc., Ass'n., 29 Fed. Rep., 198; Insurance Co. v. Newton, 22 Wall., 38.

[4] Goldschmidt v. Mutual Life, etc., 102 N. Y., 486; 7 N. E. Rep., 408.

[5] Guardian Mutual, etc., v. Hogan, 80 Ill., 47.

[6] Mallory v. Travelers Ins. Co., 47 N. Y., 52

§176. Known violation of the law. The contract of insurance is not to be avoided by the mere fact that, at the time of his death, the assured was violating the law, if the death occurred from some cause other than such violation.[1]

It is sufficient to relieve the society if the known violation of law was such as to proximately lead to the death of the assured by bringing him into danger of losing his life.[2]

In Cluff v. Mut. Ben., etc., Co., 99 Mass., 317, it was held that in order to avoid the contract of insurance on the ground that the insured died while violating the law of a state, the company must prove that the assured died while engaged in a voluntary criminal act.

This decision is criticised in Bradley v. Mutual Ben., etc., *supra*, and Bloom v. Franklin Life, etc., *supra*, and its soundness denied.

In Bloom v. Franklin Life, etc., *supra*, the court holds this to be the law: "A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy, if the natural and reasonable consequence of the act does not increase the risk."

A person insured in a mutual benefit society, entered the office of the state treasurer, obtained, by a show of arms, a sum of money, and was shot and killed while making his escape, but before he had reached the outer door of the capitol. It was held that, as he had obtained the money, and was making his escape when shot, he was not, at the instant of death, violating any law, so as to forfeit a certificate of membership containing a clause providing for a forfeiture, in case the insured should "die while violating any law."[3]

A policy contained a provision rendering it void, if the insured should die "in consequence of his violation of any law." The insured was killed by H. shortly after having illicit intercourse with the wife of H., and it was held that, even if the act of the insured was a violation of the law, he did not die in consequence of it, within the meaning of the policy, and the policy was not avoided thereby.[4]

[1] Griffin v. West. Mut. Ben. Ass'n, 20 Neb., 620; 31 N. W. Rep., 122; Harper's Admr v. Phœnix Ins Co., 19 Mo., 506; Bradley v. Mut. Ben., etc., 45 N. Y., 422; Murray v. N. Y. Life, etc., 96 N. Y., 614.

[2] Bloom v. Franklin Life, etc., 97 Ind., 478; Insurance Co. v. Seaver, 86 U. S., 531.

[3] Griffin v. Western Mutual etc., Neb.; N. W. Rep. 122.

[4] Goetzmann v. Conn. Mut. Life Ins. Co., 5 Thompson & Cook (N. Y. Supreme Ct.) 572.

CHAPTER XI.

Who May be Beneficiary—Insurable Interest.

Part I.

SEC. 177. Generally.
SEC. 178. When a stranger may be a beneficiary.
SEC. 179. When a stranger may not be a beneficiary.
SEC. 180. "Family" of member,
SEC. 181. "Wife" of member,
SEC. 182. "Benefiting and aiding family."
SEC. 183. "Widows' and orphans' fund"—effect of provision.
SEC. 184. Fund payable as member may direct.
SEC. 185. When fund is not payable to the estate of deceased member.
SEC. 186. Heirs of deceased member.
SEC. 187. Creditor of member.
SEC. 188. "Legal representatives."
SEC. 189. Effect of amendment of organic law on insurable interest.
SEC. 190. Divorced wife.

§ **177. Generally.** It is well settled that a policy of insurance, taken out on the life of another by a beneficiary who has no pecuniary interest in the continuance of the life so insured, is a wagering contract and void.

This rule is as applicable to a contract of insurance issued by a mutual benefit society as to those issued by ordinary insurance companies.

A person may, of his own accord, insure his life, pay the premiums himself, and make the policy payable upon his death to a third person who has no insurable interest in his life. But while the weight of authority is strongly in favor of

[1]Elkhart Mutual. etc. v. Houghton 98 Ind. 149.

[2] Bliss on Insurance, Sec. 26; Johnson *et al.* v. Van Epps, 110 Ill. 551; Lemon v. Phoenix M. L. Ins. Co, 38 Conn. 294; Rawls v. Life Ins. Co., 27 N. Y. 282; Olmsted v. Keys, 85 N. Y. 597; Fairchild v. Allen, 11 R. I., 439; Conn. M. L. etc. v. Schaefer, 94 U. S. 457; Ætna Life Insurance Co. v. France, 94 U.S.561; Provident Life etc. v. Baum, 29 Ind. 236; Elkhart Mut. etc. v. Houghton, 103 Ind. 286; Campbell v. N. E. Mut. etc., 98 Mass. 381; American etc. Ins. Co. v. Robertshaw, 26 Pa. St. 189; Fairchild v. N. E. Mut. etc. 51, Vt. 624; Langdon v. Union Mut. etc., 14 Fed. Rep. 272.

this principle, and while contracts of insurance in mutual benefit societies are, in many respects, governed by the same principles as ordinary policies of insurance, it by no means follows that a member of a mutual benefit society may make his certificate payable to one having no insurable interest in his life.

The law under which the society is organized, the by-laws, rules and regulations not inconsistent therewith, govern this matter, and must be looked to in order to determine who may, or may not, become beneficiaries.

§ 178. **When stranger may be beneficiary.** In Bloomington Mutual etc. v. Blue, 120 Ill. 121; 11 N. E. Rep. 331, it was held that, as the laws of Illinois provided for the organization of life insurance companies upon the assessment plan, to furnish indemnity or pecuniary benefits to devisees or legatees of members, as well as to their widows, orphans, etc., and a member might, under the charter, devise the benefits of his policy to a stranger, so he might, in the first instance, take out the policy payable to a stranger.

In Indiana, the act of 1883, providing for the incorporation of mutual assessment associations, does not designate who may become beneficiaries, and it was held, in that state, that, as a person has an insurable interest in his own life, which he may insure for the benefit of another, a member might take out a policy in such an association, and make it payable to one who had no insurable interest in his life.[1]

A society was organized under chapter 267 of Laws of New York of 1875, entitled—"An act for incorporation of societies or clubs for certain lawful purposes." The certificate of incorporation stated the object of the corporation to be "to combine the efforts of all its members, with the view to effect mutual relief, etc., during their lifetime, or to their respective families from time to time when rendered necessary by sickness or distress." The by-laws declared the specific object of the society to be for the mutual protection of its members, and to furnish aid to a member's family or assigns, in case of his death.

It was held that the society could not escape the payment

[1] Elkhart Mut. Aid etc. v. Houghton, 103 Ind. 286; 2 N. E. R. 763.

of a stipulated sum to a person because he was not a member of the family of the deceased.[1]

A provision of the constitution of a society, declaring that the object of the society is to "afford financial aid and benefit to the widows, orphans and heirs or devisees of the deceased members of the order," will not necessarily restrict the holder of a certificate to the selection of a beneficiary from among the members of his own family.[2]

The articles of incorporation of a benefit society provided that the object of the society was "to provide benevolence and charity by establishing a widows' and orphans' fund, from which, on satisfactory evidence of the death of a member, * * * * a sum not exceeding $2,000.00 shall be paid to his family, or as he may direct."

The court held that this provision did not restrict the designation of the beneficiary to members of the family of a member, and that the member had an absolute power to designate the beneficiary.[3]

§ 179. When a stranger may not be a beneficiary. In Ohio, the law provided for the organization of mutual benefit societies "for the payment of stipulated sums of money to the families or heirs of deceased members."

A certificate of membership in a society organized under this law was issued, payable to the assured member, "or any person designated by his will, or his heirs if no person is designated herein, or by will." It was held that the assured was not thereby authorized to constitute by testamentary appointment, as beneficiary of such insurance, a person who was not of the family of the assured, or who would not, upon his death, become his heir.[4]

The law of Michigan authorizes the organization of societies to secure "to the family or heirs of any member, upon his death," a certain sum of money. This language of the law excludes as beneficiary a person who is not related to the assured, and whose interest is not promoted by the continuance of the life of the assured.[5]

[1] Massey v. Rochester Mut. etc., 102 N. Y. 523; 7 N. E. Rep. 619, affirming 34 Hun 254.

[2] Lamont v. Grand Lodge, Iowa Legion of Honor, 31 Fed. Rep. 177.

[3] Mitchell v. Grand Lodge, etc., 70 Iowa 360; 30 N. W. Rep. 865, also to same effect, Sup. Lodge, etc., v. Martin, 12 Ins. L. Jour. 628.

[4] National Mutual, etc. v. Gonser, 43 Ohio St. 1; 1 N .E. Rep. 11; State v. Central Ohio Mutual, etc., 29 Ohio St. 399; State v. People's Mutual, etc., 42 Ohio St. 579.

[5] Mutual Benefit, etc. v. Hoyt, 46 Mich. 473.

§ **180. "Family" of members.** The laws of Michigan provide for the organization of mutual benefit societies to secure to "the family or heirs of any member, upon his death," a certain sum of money.

An old man became a member of a society organized under this act, and designated as his beneficiary a young lady who was not related to him, but who had lived with him for many years in the same household, and had been treated by him as if she were his daughter. In deciding that such a designation was within the terms of the above law, the Supreme Court of Michigan says:

"Now this word 'family' contained in the statute, is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relations, or any group constituting a distinct domestic or social body. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers. We discover nothing in the statute implying a narrow sense, and we should not be inclined to attribute one where the result would cause injustice. It seems to us that the circumstances constitute a case within the meaning of the legislature."[1]

§ **181. "Wife" of member.** In Watson v. Centennial Mutual Life Ass'n., 21 Fed. Rep. 698, the testimony showed that the deceased member and the complainant had, for ten years prior to the death of the member, lived together as husband and wife, though no marriage ceremony had ever been performed; that they lived together as husband and wife continuously during those years, in the same house, recognizing each other as such, and being so recognized by their friends and neighbors, he providing for her as husband, and she taking care of the household duties. While in that relation, he took out an insurance in her name as Mrs. Nellie Brooks.

The court held that the mere name in which he took out the contract of insurance did not change the mutual relations of the parties, that they were, under the laws of Missouri, husband and wife, and that she had an insurable interest, and could maintain the action.

[1] Carmichael v. The N. W. Mut. Ben. Ass'n, 51 Mich. 494; See Folmer's Appeal, 87 Pa. St. 133.

The constitution of a society stated its object to be to "provide for the relief of widows, orphans and heirs of deceased members."

A member designated his wife as beneficiary, and she paid all assessments but two out of her own earnings. After his death, in an action to recover the sum due on the certificate of membership, the defense was that the plaintiff was not the lawful wife of the member, as he had a wife living at the time of his pretended marriage to plaintiff. It was held that the facts so set up did not constitute a defense to the cause of action. The court says: "It may be true that the by-law, which prescribes the obligation and duty of the association, on the death of a member, contemplated a payment to the person who should be the lawful widow of a deceased member. But this was not a limitation of the power of the company so as to prevent it from recognizing as the beneficiary, a person who might be designated by the member as holding to him the relation of wife. Such designation made during the life-time of the member and assented to by the company, until changed by the mutual agreement of the member and the company, or at least until the arrangement was repudiated by one of the parties thereto, was binding. The non-disclosure by Story (deceased member) of the prior marriage was not a fraud upon the association. Its obligation was not in any way enlarged by making the plaintiff the beneficiary. Nor did the appropriation of the fund for her benefit contravene the policy or objects of the association. The plaintiff had for sixteen years lived with Story, believing herself to be his lawful wife. They had children dependent upon them for support. It was a case where it was the duty of Story to provide for them, and the provision he made through this insurance was in entire accord with the object of the defendant's organization." [1]

In the absence of qualifying circumstances, the beneficiary intended by a by-law which provides for the payment of the benefit fund to the widow of a deceased member, is the lawful wife of the member, in case she survives him. Nevertheless, it is legally possible for a member to designate as his beneficiary a woman with whom he is living, although he may not have been legally married to her, and if such designation is

[1] Story v. Williamsburgh M. M. B. Association, 95 N. Y. 474; Durian v. Central Verein, 7 Daly (N. Y.) 168.

assented to by the society, and becomes part of the contract, she may, after his death, recover on the contract.

But in order that the woman thus designated may recover, she must assume the burden of proof, and clearly establish, not only that such designation was made, but also that it became a part of the contract.

Courts will not assist in encouraging concubinage, and no right of a lawful wife or child will be permitted to be taken away, except upon clear proof.

The doctrine of Story v. The Williamsburgh M. M. B. Association, 95 N. Y. 474 should not be extended beyond the substantial facts of that case.[1]

The evidence in an action on a benefit certificate showed the following facts:

In 1869, a man married a woman in London, and she survived him when he died in 1883. This man, in 1882, represented himself as a single man, and became a member of a mutual benefit society. Afterward, in 1882, a marriage ceremony took place between him and another woman, the plaintiff in the action, and they thereafter lived together as man and wife. The member notified his lodge that he had married, and that his wife's name was Rebecca. The secretary of the lodge, in conformity with the requirements of the by-laws of the order, reported the facts so communicated to the United States Grand Lodge of the order. After this notification the member continued to pay dues which he was required to pay quarterly, and died in good standing in December, 1883.

It was held by the court that this evidence was not sufficient to establish that plaintiff had been accepted by the society as the beneficiary of the contract made with the member, and that such acceptance had become part of the contract to the exclusion of the lawful wife, whom he had married in 1869, and to whom, by the provisions of the by-laws, the benefit fund was payable; and it was consequently further held that a direction of a verdict in favor of the plaintiff was erroneous.[2]

A woman who is married to a man, but illegally, because he had a former wife living at the time, has an insurable interest in his life.[3]

But if there is a breach of warranty, by reason of the falsity

[1] Schnook v. I. O. Sons of Benjamin, 24 N. Y. Weekly Dig 348; 21 J. & S. (N. Y. Superior Ct.) 181.

[2] Schnook v. I. O. Sons of Benjamin, *supra*.

[3] Equitable etc. Soc. v. Peterson 41 Ga. 338.

of the statement in the application, that the assured and the beneficiary are husband and wife, there can be no recovery on the policy.[1]

§ **182. "Benefiting and aiding family."** A. became a member of the Knights of Birmingham, an incorporated society, the charter of which sets forth its object to be "the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members." It was provided in article nineteen of its constitution that the benefit fund, at the death of a member, should "be paid to such person, or persons, as the deceased may have designated to receive the same, as appears on the books of the lodge of which he is a member."

A. borrowed the amount of money, which the society would be liable to pay, at his death, from his sister. He designated her on the books of the lodge as the person to whom payment should be made by the society, and she paid his dues to the society. At the death of the member, the benefit fund was claimed by his sister, and also by his widow and children.

The Supreme Court of Pennsylvania held that the amount due from the society must be paid to the sister of the deceased member, and, in the opinion, says:

"The learned court below was of opinion that there was a fatal conflict between the charter and the constitution in respect of the persons who may receive benefits from the defendant company, and for that reason alone refused judgment to the plaintiff (the sister). The second section of the charter, upon which this conclusion is based, is in the following words: 'The purposes of this corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members.' Construing these words, the learned court below held that it was not within the power of the defendant to stipulate for the payment of the benefits to any person, other than the widow and orphans, who might be designated as the recipient by the deceased under article 19 of the constitution. We think this is too narrow and strained a view to take of the second section of the charter quoted above. While it is true that the general purpose of the corporation is there stated to be the maintenance of a society for benefiting and aiding widows and

[1] Holabird v. Ins. Co. 2 Dill. 166; 2 Ins. Law Jour. 588.

orphans of deceased members, it must be observed that this is only the statement of a general purpose. It is only the recital of an object sought to be accomplished, and which, doubtless, is accomplished in the great majority of cases, even though in exceptional cases the benefits may, by special contract, be paid to other persons than the widow or orphans. There is no prohibitory or restrictive language excluding from the powers of the corporation the right to contract specially with the member for the payment of benefits to other persons than his widow or orphans. Nor is such a contract to be held void by reason of any necessary implication from the language of the charter. For the widow and orphans may be much benefited, and in many ways, by a contract designating another beneficiary, as, for instance, if the member, in his life time, desiring to establish a home for his wife and children, which they might hold after his death, borrowed money for that purpose, and so used it, and, to secure the loan, designated the lender as the beneficiary of his membership, certainly his widow and orphans would be materially benefited by such an arrangement. Or if, having a home, he met with disaster, and was about to lose it by judicial sale, and should save it by a similar provision, his widow and orphans would be thereby benefited. Or if, having property and also debts, but not to the point of insolvency, he could borrow money by means of a membership with such an association, and he should become a member for that very purpose, the creditor possibly paying the dues, and he could to that extent diminish his indebtedness during his life, and thus leave that much more of his property to his widow and orphans, undoubtedly they would be thereby benefited. Or he might borrow the money and give it directly to his wife or children during his life, pledging his membership to the lender as above, and then also they would receive the full advantage of the transaction without waiting until his death. Many more illustrations of a similar character might easily be suggested, but it is unnecessary. They all prove the same proposition, to wit, that it is entirely possible to benefit the widow or orphans by means of such a membership, though neither of them is the designated beneficiary, and hence there is no necessary conflict between the second section of the charter and the nineteenth article of the constitution.

But again the member may be unmarried, or he may have become a widower and without children during his life, though

at the time his membership commenced, he may have had both a wife and children. Surely, in such a case, it would not be contended that the company could resist payment if the action were brought by an administrator, even though the money was needed only for the payment of debts, or if brought by a designated beneficiary, who had loaned money on the faith of the membership. Further discussion does not seem to be required."[1]

§ 183. "Widows' and orphans' fund"—effect of provision. In Highland v. Highland, 109 Ill., 366, it is said: "It is urged that, by the terms of the charter or act of incorporation of the order, the fund out of which appellee seeks payment is established as a 'widows' and orphans' benefit fund,' which is sacred to the relief of widows and orphans, and that it is not in the power of the member, or of the lodge, or both, to alter or defeat the right of those who, by the charter, are declared to be the beneficiaries. The charter, among the objects of the corporation, declares to be: 'To promote benevolence and charity, by establishing a widows' and orphans' benefit fund, from which, on the satisfactory evidence of the death of a member of the corporation, who has complied with its lawful requirements, a sum not exceeding five thousand dollars ($5,000.00) shall be paid to his family, or as he may direct.' It is insisted that this makes the primary object to be the establishment of a *widows'* and *orphans'* fund, and that it is only in the absence of a family that the member may direct to whom the benefit shall be paid, or at least, where there be a family, that the power of direction is limited to naming the *proportions* in which the fund shall be divided among them. No doubt it is an object to provide a widows' and orphans' benefit fund, and it will remain as such a fund, unless the member directs to the contrary. But notwithstanding the description as a 'widows' and orphans' benefit fund,' it is equally the purpose that the member should have the power of directing to whom payment of his benefit should be made, as that the fund is to be for the benefit of his family. The language that the sum shall be paid to the member's 'family, or as he may direct,' gives to him, in the most plain terms, the power of absolute direction to what person or persons the payment shall be made. Evidently the language

[1] Maneely v. Knights of Birmingham, 115 Pa. St., 305; 9 Atl. Rep, 41.

of the charter will not bear the construction which appellant's counsel would place upon it." [1]

§ 184. Fund payable as member may direct. Where the charter provides for the payment of a sum of money upon the death of a member "to his family, or as he may direct," the member may direct as his beneficiary, any person, whether a member of his family or not.[2]

§ 185. When fund is not payable to estate of deceased member. Where the object and purpose of the society is to pay "legal heirs and beneficiaries" of a deceased member such sum of money as may be realized from an assessment, etc., the designation by a member of "my estate" as beneficiary is invalid.[3]

In Daniel's Ex'r v. Pratt *et al.*, Mass. 10 N. E. Rep. 166, on the death of the testator, a deceased member of the Masonic Mutual Relief Association of Western Massachusetts, the money due on his certificate of membership was paid over to the executor of the estate, without question by the society. A by-law of the association provided that when a member should die, leaving no widow, child, mother or father, payment should be made to the executor. It was held that the executor of the testator held the fund, not as general assets of the estate, but for distribution according to rules established by the statutes of distribution, that the laws of Massachusetts regulating such corporations limited beneficiaries to relatives of members, and the designation by the testator of his "estate" as his beneficiary was invalid as contrary to the laws under which the company was organized, which provide for the organization of societies "for the purpose of assisting the widows, orphans, or other dependents of deceased members."

The same testator had been a member of a mutual benefit society, organized under the laws of the State of New York, and the same executor received the endowment due from that company, on the death of the testator, who had, in his last will and testament, named his "estate" as his beneficiary. It

[1] See also Highland v. Highland, 13 Ill App. 510.

[2] Gentry v. Supreme Lodge, K of H. 20 Cent. Law Jour. 393; Tennessee Lodge v. Ladd, 73 Tenn. (5 Lea) 716; Mitchell v. Grand Lodge, 70 Iowa 360; 30 N. W. Rep. 865; Supreme Lodge v. Martin, 12 Ins. L. Jour. 628; Sabin v. Grand Lodge, 26 N. Y. Weekly Dig. 309; 6 N. Y. St. Rep. 151; Barton v. Provident Mutual, etc., 63 N. H. 535. Highland v. Highland, 109 Ill. 366.

[3] Basye v. Adams, 81 Ky. 371.

was held that his executor, qualifying in Massachusetts took the fund for distribution according to the terms of the will—it not appearing that the statutes of New York made any limitation as to who should be beneficiaries.

§ **186. Heirs of deceased members.** Mass. Pub. St. chap. 115, provides that an association may be organized under said chapter, "for the purpose of assisting the widow, orphans, or other dependents of deceased members." A corporation organized under this chapter provided in its by-laws that the benefit fund should be paid "to the person designated by the member in his application for membership, or last legal assignment, provided such person or persons are heirs or members of decedent's family," and that, "if the designator leave no widow or children or assignee, then it shall be payable to his heirs." The supreme court of Massachusetts held, that the word "heirs" in such by-law is used in its limited sense, to designate such persons as would be the legal heirs or distributees of the deceased member at the time of his application or designation; and that where, in his application for membership, a member designated his wife as the person to whom the benefit was to be paid upon his death, and later attempted to change the designation from his wife to his mother, who was not living with him as a member of his family, and was not dependent upon him, the attempted designation to his mother was illegal and invalid, as the mother was not one of those who would be one of the member's heirs.[1]

§ **187. Creditor of member.** A person whose only relation to the deceased member is that of a creditor, is not a person dependent upon him, within the meaning of the above statute, and the promise to pay the creditor is void.[2]

§ **188. Legal representatives.** The object of an association, as declared by its charter, was "to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee, or legatee of a deceased member."

A by-law provided, "If a member has no *legal representatives*, such sum of money as they would have been entitled to, shall become the property of the association."

The term "legal representatives" in this by-law is to be taken as meaning those who are legal representatives in the

[1] Elsey v. Odd Fellows Relief etc. 7 N. E. Rep. 844.

[2] Skillings v. Mass. Ben. Association, Mass.; 15 N. E. Rep. 566.

contemplation of this charter, namely, "the widow, orphan, heir, assignee or legatee."[1]

A society incorporated "for the payment of stipulated sums of money to the family or heirs of deceased members" is not authorized to issue certificates of membership payable to the named beneficiary "or assigns"—"to himself or assignees"—"to his estate"—"to his executors or administrators" or to any person, whether a relation or not, who is not of his family or heirs.[2]

§ 189. Effect of amendment of organic law. An act authorizing mutual benefit societies to insure the lives of members for the benefit of creditors does not effect a certificate issued prior to the act by a society organized under a prior law, payable to the creditor of a member, and which was void when issued. In order to make such a certificate valid, it must appear distinctly that the society was such a corporation as could avail itself of the privileges of that act, and, if it could, that it had done so.[3]

But where the law relating to the classes of beneficiaries who may take the fund of a society has been changed after the organization of the society, so as to include other beneficiaries than those first enumerated, the designation by a member of a beneficiary from an added class of beneficiaries is a designation to which the society has a right to assent, and does assent by issuing a certificate to the member payable to such beneficiary.

A mutual benefit society was incorporated under a law providing for the accumulation of a fund "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members." Afterward the law was so amended as to read "for the purpose of assisting the widows, orphans, *or other relatives of the deceased*, or any person dependent on deceased members." The society did not restrict the classes of beneficiaries allowed by law, and did not adopt the statute amending the act under which it was incorporated. A person who became a member after the amendment of the law designated, as his beneficiary, his mother who was not then, or at any time afterward, dependent on him for support. Subsequently the member married, and died in good standing in

[1] Masonic Mutual Relief Ass'n v. McAuley, 2 Mackey (D. C.) 70.

[2] State v. Standard Life Ass'n., 38 Ohio St. 281; State *ex rel.* v. People's etc. Ass'n. 42 Ohio St 579.

[3] Skillings v. Massachusetts Ben. Ass'n. Mass.; 15 N. E. Rep. 566.

the society, leaving his widow and his mother surviving him. It was held, under these facts, that the amending statute needed no formal adoption by the society, that the designation of his mother was such as he could legally make at that time, as the law which permitted a relation, merely, not being necessarily a dependent, to be designated, was in force when he made his designation, and that his mother was entitled to receive the fund.[1]

§ **190. Divorced wife.** It has been held in ordinary life insurance that a policy, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured; that a wife, having an insurable interest in the life of her husband, is not affected in her right in an insurance policy on his life, by a decree of divorce.[2]

But where the charter of a mutual benefit society declares its object to be "for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members, or to their heirs," the wife of a member, who has been designated by him as a beneficiary, loses her rights, as such, by obtaining a divorce from him.[3]

[1] Massachusetts Catholic O. of F. v. Callahan, Mass.: 16 N. E. Rep. 14.

[2] Bliss on Life Insurance at section 30; May on Insurance at section 107; Ins. Co. v. Schaffer, 94 U. S. 457; Ins. Co. v. Dunham, 46 Conn. 79; McKee v. Ins. Co., 28 Mo. 383.

[3] Tyler v. Odd Fellows Mut. Relief Ass'n., Mass.; 13 N. E. Rep. 360.

Who May Be Beneficiary. Part II.

ASSIGNMENT OF CERTIFICATE.

SEC. 191. Right to assign mutual benefit certificate.
SEC. 192. Designation of beneficiary is not an assignment of certificate.
SEC. 193. Equitable assignment.
SEC. 194. Limitation upon right to assign.
SEC. 195. Certificate may not be assigned contrary to laws of the state.
SEC. 196. Where certificate provides that it may be assigned.
SEC. 197. Consent and approval of society may be required.
SEC. 198. Rights of assignee.

Sec. 191. Right to assign mutual benefit certificate. It is clear that a certificate of membership in a mutual benefit society is not assignable, during the life of a member to whom it has been issued, to a person not within the classes named as the beneficiaries of the society.

Persons who are not capable of taking the fund by designation as beneficiaries in the first instance, cannot take it indirectly by assignment of the certificate. These societies are intended to render assistance to the designated classes of persons, in a particular and special method, and their purpose would be defeated by permitting assignments of certificates to be made to other persons.[1]

The charter of a society provided, "The business of said association shall be, to afford relief to the widows and children of its deceased members, and to such business it shall be limited and restricted."

A policy issued by the society was made payable to the wife of the member, and, in case of her death prior to his, to his children. Afterward, the member becoming indebted to the society in a large sum of money, assigned this policy to the

[1] Bayse v. Adams, 81 Ky. 368; Briggs, Trustee, v. Earl *et al.* Mass. 1 N. E. Rep. 847.

society as collateral security for the debt. In an action on the policy by the children, it was held that this assignment was void, as being in violation of the charter of the society, and in contravention of the sole objects and benevolent purposes for which it was organized.[1]

In Lamont v. Hotel Mens' Mutual Benefit Association, 30 Fed. Rep. 817, the court held that where the articles of association and by-laws of a society make the benefits payable to the person designated by the member in his application for membership, or in his last will and testament, it is competent for such member by his own act, and with the consent of the society, at any time before his death, without the formalities of a will, to make a transfer and assignment of the benefit fund from the original beneficiary named to any other person he may select.[2]

After the death of a member, when the right to the fund has become absolute in the beneficiary, this right to the benefit fund may be assigned as any other chose in action.

§ 192. Designation of beneficiary not an assignment. Where the charter, by-laws, or certificate of membership provide that the member may designate his beneficiaries by endorsement of their names upon the certificate, a direction by the member, written on the back of his certificate, that the fund shall be paid to certain persons, is to be regarded as a designation of the beneficiaries, and not as an assignment of the certificate.

In such case, the delivery of the certificate to the persons named, is not necessary to give them the right to take the fund.[3]

§ 193. Equitable assignment. The doctrine of "equitable assignment" was held to apply in the following case. A member of "The Railway Conductor's Mutual Association," was insured by the association in the sum of $2,500.00. The by-laws of the association provided that this fund might be disposed of by will, and if not disposed of, should belong to, and be paid to his widow, or in case he left no widow, then to his legal heirs or representatives.

[1] Dietrich v. Madison Relief Ass'n 45 Wis. 79.

[2] See Bloomington Mutual etc. v. Blue, 120 Ill. 121; 11 N. E. Rep. 331.

[3] Benevolent Society v. Fleitsam Adm'r, 97 Ill. 474; Highland v. Highland, 109 Ill. 366.

By will, the member gave the fund to his two daughters, and this will remained in existence unrevoked at the time of his death. About five months before his death, he wrote to his wife, telling her that assessments upon his certificate were due, in the amount of $38.00, and that if she would pay the assessments, and keep them paid up, the policy should be hers. In the letter he enclosed the following writing:

"SAN DIEGO, CAL., Dec. 11, 1877.

Know all men by these presents, that this is my wish, made in sound mind, that I revoke all former life insurance policies, and do this day, Dec. 11, 1877, make my policy of the Conductor's Life and Benefit Association, read for the benefit of Mrs. M. A. Swift in case of my death, and for her special benefit all that may be derived therefrom.

CLARK SWIFT."

Upon the receipt of this paper, Mrs M. A. Swift, the wife, paid up the assessments, and soon afterward the member died. The court held that these writings, in connection with the action of the wife, accomplished a transfer or assignment to his wife, of all his interest in the certificate of insurance.[2]

Mulkey, J., dissented from the reasoning and conclusion of the opinion. His dissenting opinion is sustained by the decided weight of authority.

The fund did not belong to the member. He could control its direction in the method, and to the extent provided in the by-law. He had designated his children as his beneficiaries, and they had a right to the fund at his death, unless he had made a change of beneficiaries in accordance with the contract of insurance. He could have made his wife his beneficiary by a later testamentary appointment, or by merely revoking his will and leaving the beneficiary to be designated by the by-law above referred to, but under the contract he had no power to assign the certificate.[3]

An unmarried man took out a policy of insurance on his

[1] Swift v. Benefit Association, 96 Ill. 309; See also Brown v. Mansus, N. H. 5 Atl. Rep. 768.

[2] See Designation of Beneficiary, Chapter XII. The payment by her, as assignee, of assessments, even though made in good faith, gave her no title to the contract of insurance; De Jonge v. Goldsmith, 86 N. Y. 614; The advancement of assessments under the circumstances gave to the wife an equitable lien upon the fund for the amount paid by her, but she was entitled to nothing more; Dutton v. Willner, 52 N. Y. 312; National Mutual Aid Society v. Lupold, 101 Pa. St 111; Meier v. Meier, 15 Mo. App. 68. Weisert v.

[3] Muehl. 81 Ky. 336.

life, one of the conditions of which was: "This policy is issued and accepted, upon the express condition that the assured may, with the consent of the company, at any time, assign it, or before assignment, change the beneficiaries therein, or make any other change."

He named his sister as his beneficiary, and delivered the policy to her. Subsequently he married, and, as an inducement thereto, he agreed that if the woman would marry him, she should be made the beneficiary of the policy. After the marriage, and when the next semi-annual premium fell due, the assured paid it, on condition that the beneficiary should be changed from his sister to his wife. The sister had the policy, and would not give it up. The agent was uncertain whether the change could be made without the policy, but promised to notifiy the company and have the change made if possible. The officers agreed to attend to the matter, but overlooked it. After the death of the assured, the company filed a bill to require the wife and sister to interplead, and have the question determined, as to who was entitled to the money. It was decided, upon these facts, that whether such change was to be effected by parol or in writing, was a matter entirely between the assured and the company; and if the latter chose to dispense with any of the modes of effecting this purpose, this concerned no third party, nor could the company capriciously refuse the change. The marriage having been consummated on the inducement of the promised change of the beneficiary under the policy, equity considers that done which ought to be done, and will give relief accordingly.[4]

A member procured a certificate of insurance, making his betrothed his beneficiary. He retained the certificate in his possession, but afterward lost it. She married another man, and, within two years thereafter, he made a statement of the loss, and applied to the society for a reissue of the certificate, making his son the beneficiary. The society denied the application, on the ground that the certificate was not surrendered, although lost, and that the rules of the society required the change to be indorsed on the original certificate. By the advice of the officers of the society, he attempted to make the change of beneficiary by giving a power of attorney to another to collect the amount which should accrue under the certificate. After his death, the society conceded its liability upon the certificate, and the court was asked, in equity and good

[4] Nally v. Nally, 74 Ga. 669.

conscience, to determine whether the original beneficiary or the son of the deceased was entitled to the fund. It was held that such acts upon the part of the member constituted an equitable assignment of the certificate.[1]

§ 194. Limitation upon the right to assign. Where, by the charter of a society, the benefit fund is payable to the assigns of the member, no limitation or condition may be placed upon the right of the member to assign his certificate.[2]

But a by-law of such a society is not inconsistent with the charter, which provides that such an assignment, in order to be valid, shall be recorded in the books of the society. This is not a limitation upon the right to assign; it is a reasonable provision for the protection of the society, and relates merely to the manner of the assignment.[3]

Where the charter is silent as to the assignment of a certificate, the society may provide, in its by-laws or certificate, for its assignment to proper beneficiaries, and may place upon its assignment such limitations and conditions as it may deem proper.

§ 195. The by-laws and certificate may not provide for an assignment of the certificate which is contrary to the law of the state. In commenting upon an assignment of a certificate, the Supreme Court of Texas says: "It is of no importance that the rules of the Knights of Honor permitted benefit certificates to be transferred to persons having no insurable interest in the life of the member, and that it consented to the assignment made in this case. No action of the lodge could change public policy, or make a contract valid which the interests of society demanded should not be enforced."[4]

In this case, the court held that the assignment of a contract of insurance upon the life of a member to his cousin, who lived with him as an adult male member of his family, and as a dependent upon the member for employment and support, upon an agreement by the assignee to pay the assessments necessary to keep the policy in force, is void as being to one

[1] Grand Lodge v. Child Mich. 38 N. W. Rep. 1.

[2] Raub v. Masonic Mutual Relief Association, 3 Mackey, D.C. 68.

[3] Coleman v. Knights of Honor, 18 Mo. App. 189.

[4] Price v. Supreme Lodge etc. Texas; 4 S. W. Rep, 633.

who has no insurable interest in the life of the assured, and as being against public policy; and the court gave the fund to the original beneficiary named in the contract.

It is well settled in the federal courts that a party cannot take out an insurance upon his own life, and assign the policy, either contemporaneously with its execution or subsequently, to a person having no legal interest in his life, but the decisions of the state courts upon this point are conflicting.[1]

In New York it is held that a valid contract of insurance may be assigned to a person who has no insurable interest in the life of the insured—that the contract, being valid in its inception between the parties, is valid in the hands of the assignee.[2]

§ 196. Where certificate provides that it may be assigned. In Jackson *et al.* v. Anderson *et al*, Ky.; 3 S. W. Rep. 326, it was held that although ordinary life insurance policies are not assignable, and cannot be placed upon the market as a promissory note or bank paper, where a certificate of membership in a mutual benefit society, in terms, confers on the member a right to assign the benefit, and the member assigns it in exchange for a tract of land, the assignee, after retaining it for ten years, cannot sue to set aside the contract on the ground that, in the particular instance, there was no right to assign, and recover back the land, especially where it appears that he has not tendered the certificate back to the member, but has permitted it to lapse by failing to pay the premiums.

In discussing the questions involved in the case the court says: "All the certificates issued by the Kentucky Grangers' Mutual Benevolent Society purport to confer on the insured the right to assign, and it may well be doubted whether the corporation can make any defense to a *bona fide* holder who has been induced to purchase, not by the representations of the agents that they were assignable, but by express terms of the policy transferred."

§ 197. Consent and approval of society may be required. A society issued a benefit certificate whereby a member's life was insured in a certain sum, and the certificate

[1] Warnock v. Davis, 104 U.S. 775; Cammack v. Lewis, 15 Wall, 643.

[2] Olmsted v. Keys, 85 N. Y. 593.

provided that no assignment thereof should be valid unless approved by the secretary of the society. The member assigned it without such approval, and the court held such assignment invalid.[1]

A society may provide that certificates of membership, wherein the lives of members are assured for the benefit of such persons as shall be designated by the member receiving the certificate, shall be assigned and transferred only with the consent of the society endorsed thereon; and one to whom such a certificate has been assigned without such endorsement cannot mantain an action against the society after the death of the assignor.[2]

§ **198. Rights of assigned.** A person accepting, by assignment from a member, a certificate of membership in a mutual benefit society, is bound by the provisions and conditions of the constitution and by-laws of the society relating to the contract of insurance; and this is especially true when the constitution and by-laws are made a part of the certificate by its express terms.[3]

[1] Harman v. Lewis *et al.*, 24 Fed. Rep., 97-530.

[2] National Mutual, etc., v. Lupold, 101 Pa. St., 111.

[3] Miller v. Assurance Association, 42 N. J. Eq. 459; 7 Atl. Rep. 895.

Who May be Beneficiary. Part III.

ATTACHMENT, GARNISHMENT, ETC.

SEC. 199. Generally.
SEC. 200. When benefit fund of society may, or may not, be attached.

§ 199. Attachment, garnishment, etc.—Generally. In treating of the question as to who may, by contract, legally acquire the benefits of certificates of insurance in mutual assessment societies, it is proper also to inquire whether those benefits may be reached by third parties, by process of law.

As a general rule, when the preliminary proofs—the making of which is a condition precedent to a recovery upon a life insurance policy—have been made, the amount due and owing to the beneficiary may be reached by attachment and garnishment in the same manner, and to the same extent, as other choses in action.

In Girard F. & M. Ins. Co. v. Field, 45 Pa. St., 129, it was held that where a loss had occurred under the policy of insurance, a garnishment would lie against the fund, whether proofs of loss had been made, or not, at the time garnishee process was served, and that the simple operation of the garnishee process was to place the plaintiff in the garnishee proceedings into the same relation with the company that the defendant would have held, but for the proceedings in garnishment.[1]

Several cases, however, hold that the proceeds of a policy of insurance cannot be made the subject of attachment or garnishment proceedings until such preliminary proofs have been made. They base their view upon the theory that, as the liability of the company does not ripen into an indebtedness by the mere lapse of time, but upon the performance of some act by the other party to the contract, the company may, until such act

[1] See Ins. Co. v. Connor, 20 Ill. App., 297.

has been performed, properly say that there is nothing due the beneficiary upon the policy.[2]

§ 200. When benefit fund may or may not be attached, etc. While, with regard to ordinary life insurance contracts, the rule is undoubtedly as above stated, it has, nevertheless, been held that contracts of insurance in mutual benefit societies cannot be made the subject of attachment or garnishment proceedings.

This immunity of the fund from such proceedings arises, if at all, from the provisions of the law providing for the organization of such societies.

Public statutes of Mass., chap. 115, sec. 8, enacts that a corporation organized under that chapter may "provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto, and such fund so held shall not be liable to attachment by trustee or other process." In construing this provision of the law, the court says: "In view of the object of these beneficiary corporations, of the limited number of persons for whose benefit they are intended, of the fact that the member of the corporation could not provide for his creditors by a benefit certificate, or dispose of the fund by testamentary bequest, we cannot doubt that the fund due on the certificate is not subject to the attachment while it remains in the hands of the corporation. If it were, it would be impossible for the member, in many instances, to provide for those for whom it was contemplated that he should, by this method, be able to make provisions."

The court held that, upon the death of the husband, the wife's interest in the benefit fund could not be attached, in the hands of the society, for her debt.[3]

In Schillinger v. Boes, etc., Ky.; 3 S. W. Rep., 427, it was held that a certificate of membership in a mutual benefit society, payable to the widow of a member, is for the benefit of the member's family, and cannot be seized, upon the death of a member, by the widow's creditors, where the charter of the association provides that the funds shall be for the relief of the member's family, and shall be exempt from seizure under

[2] Lovejoy *et al.* v. Hartford Ins. Co. *et al.*, 11 Fed. Rep., 63; Martz v. Detroit Fire & Marine Ins. Co., 28 Mich., 201; Bishop v. Young, 17 Wis., 46.

[3] Saunders v. Robinson *et al*, Mass.; 10 N. E. Rep., 815.

execution or other legal process, to pay any debt of the deceased member.

This construction was given to this provision of the charter, on the ground that it harmonized with the legislative action upon the subject, as well as with the rule which, when applied to such organizations, requires a liberal construction of their charters in favor of the objects of their bounty, and to prevent the application of their funds to the benefit of those who are strangers to the organization.

§ **200a.** The charter of a society provided: "No part of the stock or interest, which any member, or his widow, or children may have in said *institution*, shall be subject to any debt, liability, or legal or equitable process against him, or any of them."

A member died, and his son became entitled to $100.00 as a beneficiary of his certificate. The creditor of the son levied upon that sum in the hands of the society by attachment, and it was held that the money was subject to such attachment. The court says:

"The money due to the representatives of a deceased member, is in no sense an interest 'in said institution.' It is a debt due from it to them, not as shareholders, but as creditors." [1]

In Hankinson v. Page, 31 Fed. Rep. 184, it was held that the interest of an heir at law of a deceased member of a mutual benefit society, in a sum to be raised and paid by the society on the death of a member, was attachable in New York. In this case, it was insisted that the demand against the society was in the nature of equitable assets, and, therefore, could not be attached, but, upon this point, the court says:

"Although an attachment is a special remedy at law, and, in the absence of statutory authority, does not reach property or interests which can only be realized by the assistance of a court of equity, the tendency of legislation in this country has been to enlarge the operation of the writ, and subject interests and kinds of property to seizure under an attachment, which are not subject to execution at law."[2]

The court held that, as the beneficiary could maintain a suit at law to enforce the contract against the association, and was

[1] Geiger and Board, etc., v. Mc Lin, 78 Ky. 232.

[2] Drake on Attachment at sec. 7.

not compelled to resort to equity, the point was not well taken.

Where the law, under which a mutual benefit society is organized, provides that the benefit fund shall be exempt "from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt or liability of such deceased member," the fund, after it has been received by the beneficiary, is not exempt from the claims of the creditors of such beneficiary.[2]

[2] Bolt v. Keyhoe, 30 Hun 619.

CHAPTER XII.

Designation of Beneficiary.—Part I.

Designation and Change of Beneficiary.

Sec. 201. } Sec. 202. } In mutual benefit society, beneficiary has no vested rights.
Sec. 203. Right of members to change beneficiary when certificate is payable to his legal representatives.
Sec. 204. Effect, on right to change, of delivery of certificate to beneficiary named therein.
Sec. 205. Effect of agreement between two members, that each shall procure certificate for benefit of survivor.
Sec. 206. How change of beneficiary is to be made.
Sec. 207. Fund payable "as member may direct."
Sec. 208. Designation by will.
Sec. 209. Where the right to devise the fund is conferred by charter.
Sec. 210. When designation by will is invalid.
Sec. 211. } Sec. 215. } Power of appointment reserved to the member.
Sec. 216. When power to designate or change beneficiary is exhausted.
Sec. 217. Time within which power of appointment must be exercised.
Sec. 218. Designation by special direction.
Sec. 219. Delivery of certificate to beneficiary not necessary.

Sec. 201. In mutual benefit society, beneficiary has no vested rights. A policy of insurance in an ordinary life insurance company is not the property of the assured in any sense, but it is the property of the beneficiary from the day of its issue, for, from that time, he has the whole beneficial interest.[1]

The beneficiary alone has the right to assign or surrender it. The contract of insurance is between the company, on the one part, and the beneficiary, on the other, and from the day of its

[1] 2 Phillips Ins. p. 626—sections 2058, 2059, 2060; Bliss on Life Insurance, Section 318; Chapin v. Fellowes, 36 Conn. 132; Rawls v. Am. Mut. Life, etc., 27 N. Y. 282; Washington Life, ect., v. Haney, 10 Kan. 525; Pence v. Makepeace, 65 Ind. 345; Wilburn v. Wilburn, 83 Ind. 55. Ricker v. Charter, O. L. I. Co., 27 Minn. 195.

issue, the assured loses control over it, and is, in some respect, a stranger to it.[1]

A power of disposition, or of appointment of a new beneficiary, may be reserved by the assured in the contract.[2]

But the decided weight of authority is to the effect that, in mutual benefit societies, the beneficiary acquires no vested right in the benefit which is to accrue upon the death of a member, until the death of a member occurs. During his lifetime the member may, therefore, exercise the power of appointment, without other limits or restrictions than such as are imposed by the organic law, or by the rules and regulations of the society, adopted in compliance therewith.[3]

Although this is the general rule, still it cannot prevail if the charter of the society prohibits a change in the beneficiary first agreed upon and designated.[4]

The essential difference between a certificate of membership in a mutual benefit society, and an ordinary life policy, is that, in the latter, the rights of the beneficiary are fixed by the terms of the policy, while in the former they depend upon the certificate and the rights of the member under the constitution and by-laws of the society. In the one case, the rights of the beneficiary are fixed and vested from the moment the policy takes effect; in the other, they are subject to such changes as the law of the society authorizes its members to make.

All that a beneficiary has during the lifetime of the member, owing to his right of revocation, is a mere expectancy, dependent upon the will and act of the holder of the certificate. This expectancy is not property.[5]

[1] The contrary doctrine, however, has been held in Wisconsin and Missouri; Foster v. Gile, 50 Wis. 603; Kernan v. Howard, 23 Wis. 108; Gambs v. Covenant Mut. L. Ins. Co. 50 Mo. 44; See also Garner v. Ins. Co. 32 Alb. L. J. 91; Ins. Co. v. Stevens, 19 Fed. Rep. 671.

[2] Greeno v. Greeno, 23 Hun 482; Hutchings v. Miner, 46 N. Y. 456.

[3] Masonic Mutual etc. v, Burkhart, 110 Ind. 189; 10 N. E. Rep. 79; Splawn v. Chew, 60 Texas 532; Aid Society v. Lewis, 9 Mo. App. 412; Ballou v. Gile, 50 Wis. 614; 7 N. W. Rep. 561; Dietrich v. Madison Relief, etc, 45 Wis. 84; Richmond v. Johnson, 28 Minn. 447; 10 N. W. Rep. 596; Eastman v. Provident etc. 20 Cent. Law J. 266; Gentry v. Sup. Lodge, 20 Cent. Law J. 393; 23 Fed. Rep. 718; Presbyterian etc. Fund v. Allen, 106 Ind. 593; 7 N. E. Rep 317; Hellenberg v. Independent Order, etc. 94 N. Y. 580; Duvall v. Goodson, 79 Ky. 224; Johnson v. Van Epps, 110 Ill. 551-558; Lamont v. Grand Lodge, etc., 31 Fed. Rep. 177; Union Mutual v. Montgomery, Mich. 38 N. W. Rep. 588

[4] Presbyterian etc. Fund v. Allen, 106 Ind 595; 7 N.E. R. 317; Kentucky etc. Ins. Co. v. Miller, 13 Bush, 489; Van Bibber v. Van Bibber, 82 Ky. 347.

[5] Masonic Mutual etc. v. Burkhart 110 Ind. 189; 10 N. E. R 79; Durian v. Central Verein, 7 Daly 168; Tennessee Lodge v. Ladd, 5 Lea 716; Swift v. Benefit Ass'n. 96 Ill. 309.

§ 202. **Same subject continued.** The true principle underlying these decisions is that, whereas policies of life insurance in ordinary companies are construed to be contracts between the company and the beneficiary, in mutual benefit societies certificates of membership, and policies of insurance are held to be contracts between the society and the member whose life is insured.

In Masonic Mutual etc. v. Burkhart, 110 Ind. 189; 11 N. E. Rep. 449, where the decision in Masonic etc. v. Burkhart, 10 N. E. Rep. 79, came before the court again, on petition for rehearing, the court says:

"The right to change the contract by mutual agreement of the parties is not derived from the charter and by-laws, but may be either directly or impliedly limited thereby. Unless the power to change is thus limited, the beneficiary named in a certificate of membership has no vested interest in the fund prior to the death of the member."

Referring to the act of March 2, 1877, Rev. St. Ind. 1881 sec. 3820, the court, in this case, says:

"That act declares that certificates of membership in charitable associations shall be regarded as contracts between the members and the association. Such certificates were contracts between the members and the society before, precisely as they were after, the act. The statute was merely declaratory of what the law was in that respect from the beginning. Prior to the statute it was competent, however, for a charitable association, in its constitution and by-laws, to limit or prohibit the right to make changes in the names of beneficiaries after they had once been designated as such. Since the statute went into effect and became incorporated into the constitutions of such societies, no limitation or restriction, repugnant to its terms, can be imposed upon the society and its members by any regulation of the association."

And it was held in Deady v. Bank Clerk's etc. Ass'n. 49 N. Y. Super. Ct. 246, that a member of a mutual benefit society, who has designated a person to receive the benefit to accrue upon his decease, may afterward designate another person. The one first designated cannot claim as under a contract.

In societies where the certificates are not contracts with the beneficiaries, the laws, rules and regulations in regard to beneficiaries may be changed during the continuance of the certificates, so as to limit and abridge their interests; and such limi-

tations are not subject to objection as impairing vested rights, or the obligation of contracts.[1]

Where the constitution of a mutual benefit society provides that its by-laws may be amended at any time, a beneficiary in a certificate of membership, having no vested rights in such certificate, and not being a party to the contract, cannot complain that a by-law in existence at the time the certificate was issued, providing that the member may surrender the certificate and receive a new one, with the consent of the beneficiary, was amended, so as to omit the consent of the beneficiary; nor can he recover on the original certificate, after it has been surrendered, and a new one issued.[2]

But where a provision of the charter, or a by-law of the society, constitutes part of the contract of insurance, its alteration, without the consent of the member, cannot affect the contract.[3]

§ 203. Right of member to change beneficiary when certificate is payable to his "legal representatives," etc. Where a certificate of membership is made payable to the "legal representatives" of the member, or to his "executors and administrators," as may be done under the charters of some societies, he may, with the consent of the society, surrender the same and take out a new certificate payable to a third person.[4]

§ 204. Effect of delivery of certificate to beneficiary named. The delivery of the certificate to the beneficiary named therein has no effect whatever upon the right of the member to change the designation, as provided in the contract of insurance.[5]

The benefit certificate issued by a society, to Mrs. H. R. F., was made payable, in the event of her death, to her husband, subject to change at her pleasure, on presentation of the certificate together with new application, to the supreme secretary. Notwithstanding the fact that the certificate was delivered to the husband, and the assessments thereon were paid by him,

[1] Durian v. Central Verein, 7 Daly 168.

[2] Byrne v. Casey, Texas; 8 S. W. Rep. 38.

[3] Morrison v. Wisconsin Odd Fellows etc., 59 Wis. 162; Gundlach v. Germania, etc. Ass'n., 49 How. Pr. 190.

[4] Johnson *et al.* v. Van Epps, 110 Ill. 551.

[5] See Nally v. Nally, 74 Ga. 669; See also "Equitable Assignment" etc. Sec. 193; Sabin v. Grand Lodge, 6 N. Y. St. Rept'r. 151.

his wife had the right, on presenting it to the supreme secretary, to apply for, and effect a change in the designation of the beneficiary named therein. When the husband accepted the certificate, and paid the assessments thereon, he knew, or ought to have known, that he held it subject to the right of his wife to change the designation of those to whom the insurance money should be paid upon her death.[1]

§ 205. Effect of agreement between two members that each shall procure certificate for benefit of survivor. When the contract of insurance provides that a member may, at any time, change the designation of his beneficiary, and make a new direction for the payment of the benefit fund, a mutual agreement between two members that each shall procure a benefit certificate for the benefit of the survivor, in case of death, does not take away from either member the power of appointment of a new beneficiary.

Where a husband and wife become members of a society and agree that their respective certificates shall be continued operative for the benefit of the survivor, and the by-laws of the society provide that any member holding a beneficiary certificate, desiring at any time to make a new direction as to its payment, may do so in a certain manner, the power of appointment of a new beneficiary still resides in each member, by virtue of the contract with the society. While the exercise of this power by the husband, for instance, is in violation of his agreement with his wife, it is one of the elements of the agreement under which the certificate was issued. The contract of insurance is executory on the part of the society during the life of the member, and its liability to pay the fund after his death is upon the last direction as to its payment, made in conformity with the terms of the contract.[2]

§ 206. How change of beneficiary is to be made. We have seen in a preceding chapter that no designation of a beneficiary may be made contrary to the general laws of the state, the organic laws of the society, and the rules and regulations made in conformity therewith.

We shall now inquire into the proper mode and manner of making and changing such designation.

[1] Fisk v. Equitable Aid Union, Pa. 11 Atl. Rep. 84.

[2] Sabin v. Grand Lodge, 26 N. Y. Weekly Dig. 309; 6 N. Y. St. Rept'r 151.

The charter, rules and regulations, or the certificates of membership, usually provide in a definite manner how the changes in the designation of beneficiaries shall be made.

It may be here remarked, that when a right to make such a change in the beneficiary, as has been made, is shown to exist, in the absence of evidence to the contrary, it will be presumed that the change was made in the manner provided in the laws, rules and regulations upon that subject.[1]

A provision of the constitution of a society, requiring a member to designate the beneficiary whom he designs to have share in the benefit fund at his death, is sufficiently complied with by any form of words that is sufficient to clearly make known his intentions, but the designation must be made in the mode prescribed by the society.

§ 207. Fund payable "as the member may direct." A by-law of an incorporated society, prescribing how the members shall direct the payment of the benefit fund, is not inconsistent with a provision of the charter that such fund shall be paid "as the member may direct," provided the rule prescribed by the society is reasonable for that purpose.[2]

§ 208. Designation by will. The mode of designating or changing the beneficiary by last will and testament has given rise to much controversy.

Where the benefit fund is payable, at the death of the member, to his estate, and where there is nothing in the act under which a corporation is organized, or in the charter, constitution, by-laws, or certificate of membership, which takes away from member the right and power of disposing of the benefit fund by last will and testament in the ordinary manner, such right certainly exists.

We have seen in the preceding chapter, that in very few societies is the estate of the member a proper beneficiary, and that in most cases the member has no property in the benefit fund. When he has, however, an interest in the fund, which may, at his death, become assests of his estate, he may dispose of such fund by will, precisely as he may bequeath other property, unless he is prohibited from doing so by the contract of insurance. The right to make such a disposition of his

[1] Hicks v. Perry, 140 Mass. 580; 5 N. E Rep. 634; Presbyterian, etc., Fund v. Allen, 106 Ind. 593; 7 N. E. R. 317; Masonic Mutual, etc. v. Burkhart, Ind; 10 N. E. R. 79.

[2] Coleman v. Knights of Honor, 18 Mo. App. 189.

property is given to a member by the laws of the land, and where it is claimed that the right to dispose of such a fund has been abridged, or entirely taken away, by the terms of the contract of insurance, the burden of proving such an abridgment or relinquishment, is upon the person making such a claim. Very clear and binding provisions must be entered into by contract to deprive a member of such a right.[1] If the member has such an interest in the fund, and there is no provisions in the charter, by-laws or certificate of membership abridging or relinquishing, either in express terms or by necessary implication, his right to dispose of the fund by will, the member may so dispose of it, either by specific or general devise; and, where it has not been specifically bequeathed in the will, it will pass under a general residuary clause; and a will bequeathing all the estate of the testator, in general terms, will pass the fund.

Where, under the contract of insurance, the member may change his beneficiary, and there is no provision of the charter, by-laws or certificate of membership, governing the manner and mode in which such change shall be made; a designation of a new beneficiary may be made by his last will and testament.[2]

But, as will be seen in the succeeding pages of this chapter, the better rule seems to be that, where the society provides a certain manner and mode of changing the beneficiary, the prescribed method must be followed; and where other methods are prescribed, the designation may not be made by will.

§ 209. Where the right to devise the fund is conferred by charter. The laws of Illinois provide for the organization of societies for the payment of "benefits to widows, orphans, heirs, relatives and devisees of deceased members."

A society organized under this act cannot, by provisions in its by-laws or certificates of membership, restrict or limit the right of a member to designate or change his beneficiary by will, or to bequeath the fund by will as any other chose in action. A by-law of such a society, pointing out another mode of designating or changing a beneficiary, is subject to the right of a member to designate and change the beneficiary by will.

[1] Catholic Ben. Association v. Priest, 46 Mich. 429.

[2] Kaiser v. Kaiser, 24 N. Y. Weekly Dig. 410.

Thus, in Raub v. Masonic Mut. Relief Association, 3 Mackey (D. C.) 68, an association was organized under an act of Congress, and a section of its charter provided that "the particular business and objects of such society or corporation shall be to provide and maintain a fund for the benefit of the widow, orphans, heir, assignee or legatee of a deceased member, immediately upon proof of such death." Another section of the charter authorized the directors to make by-laws, "not contrary to this charter, or to the laws of the United States." One by-law provided: "No change of beneficiary can be made or recognized until submitted to and approved by the board of directors."

A member named his sister as his beneficiary, with the consent and approval of the board of directors. Afterwards he made a will directing the fund to be paid at his death to his illegitimate son. The board of directors had no knowledge of this change, and, on the death of the member, the sister claimed the fund. The Supreme Court of the District of Columbia says: "The validity of this new designation is presented as a question for the determination of the court. * * * * The power of the association to make by-laws was limited by the charter itself to such by-laws as should not be in violation of the laws and constitution of the United States. And this would have been the case even had it not been provided for in the charter. Now one of the laws of the United States is this very charter, the second section of which provides that "the particular business and objects of such society or corporation shall be to provide and maintain a fund for the benefit of the widow, orphans, heir, assigns or legatees of a deceased member, immediately upon proof of such decease." That provision recognizes fully and completely the right of a member of the association to designate the beneficiary by his will, and that power cannot be cut off or diminished by a by-law. So far, then, as this by-law attempts to do so, it is itself inoperative. * * * * We must, therefore, give effect to the recognition contained in that statute of the power to make a bequest, and we cannot cut it down by any construction that we might give to this by-law."

§ 210. When designation by will is invalid. Where, by provision of the charter, the fund is payable to certain classes of beneficiaries, not including devisees, and the assured can have no interest in the benefit resulting from his

membership; where it is not payable to him in any event, and cannot become a part of his estate, there is nothing in the insurance contract to pass by will.[1]

When, in the charter, by-laws or certificates of membership other ways of changing beneficiaries are named, and no provision is made for changing them by will, the latter mode will be ineffectual as against the rights of the beneficiary named in the certificate.[2]

Where the by-laws of a mutual benefit society provide that the designation of the beneficiary of a member shall be made during the life-time of the member, and be approved by the directors, a designation by will is not valid. A designation which may be changed by a member at pleasure and approved or disapproved by the directors after his death, is not within the meaning of the by-laws.[3] Where the designation must, under the contract of insurance, be reported to the society for registration on its books, prior to the decease of the member, the last will and testament will operate as a sufficient designation if it be brought to the notice of the society during the lifetime of the member. In such a case it will be good as a designation, although not yet operative as a will.[4]

But where, in such a case, it is not brought to the notice of the society until after the member's death, it is ineffectual as a designation.[5]

§ 211. Power of appointment reserved to the member. Where the charter, by-laws or certificate of membership give to the member the mere power of appointing a beneficiary by will, the power of appointment must be exercised as such, and the fund will not pass as a part of the member's estate under a residuary clause of his will, or under a will merely disposing of all the estate of the testator.

The intention to execute a power of appointment by will must appear by a reference in the will to the power, or to the

[1] Olmstead v. Masonic Mut. Ben. Soc. Kan. 14 Pac. Rep. 449; Renk v. Herman Lodge, etc. 2 Demarest (N. Y.) 409; Catholic Ben. Association v. Priest, 46 Mich. 429; McClure, v. Johnson, 56 Iowa 620; 10 N.W. Rep. 217; Bown v. Catholic Mutual etc. 33 Hun (N. Y.) 263; Swift v. San Francisco Board, 67 Cal. 567.

[2] See authorities, §§ 223–224–225.

[3] Daniels v. Pratt, Mass. 10 N. E. Rep. 166, Supreme Council v. Perry Mass. 5 N. E. Rep. 634.

[4] Kepler v. Supreme Lodge K. of H. 45 Hun (N. Y.) 274; Hellenberg v. District No. 1, I. O. B. B. 94 N. Y. 583.

[5] Hellenberg v. District No. 1, *supra*.

subject of it, or from the fact that the will would be inoperative without the aid of the power.[1]

When the will of a deceased member affords no evidence of a design to execute the power by either of the modes laid down in this rule; when it neither refers to the power, nor to the sum of money which is the subject of it, nor is inoperative for want of property to give it effect as a testamentary act, it will not pass the title to the fund.[2]

An insured person had four policies on his life, in one of which (the Globe), he reserved a power to appoint a new beneficiary. His last will contained the following clause: "My life being assured as follows:" (setting out the policies) "I wish to divide among my three children as follows:" (setting out names and amounts.) No act of the insured, except that provision of the will, was set up as an attempt to execute the reserved power of substitution of a new beneficiary under the policy above referred to. The court said: "But I do not construe the will as an execution of the power. The testator treated as his own property four policies of life insurance, all of which belonged to the children of his wife. * * * None of these were subject to his bequest, yet he attempted to bequeath them all. No reference is made to the power of appointment reserved in the Globe policy. It is true that the policy is referred to by name; and, under some of the authorities, a plain and unambiguous reference to the subject of the power has been held sufficient to treat the devise or bequest of the property as an execution of a power of appointment. But in all cases to which the attention of the court has been called, the intention of the testator has been the objective point of inquiry and construction. It is impossible to impute to this testator an intention to execute this power. His intention, on the contrary, clearly was to bequeath this particular policy, with others as a part of his personal estate. This controlling intent is inconsistent with any idea of an execution of the power."[3]

§ 212. Power of appointment continued. A by-law of a society provided that the benefit fund stipulated

[1] Sugden on Powers, 301-303; 1 Story's C. C. Rep. 427; 4 Kent Com. 327 *et seq.*

[2] Duvall etc. v. Goodson, 79 Ky. 224; Hellenberg v. Dist. No. 1 etc. 94 N. Y. 580; Md. Mut. Ben. Soc. v. Clendenin, 44 Md. 429; Arthur v. Odd Fellows etc., 29 Ohio St. 559; Greeno v. Greeno, 23 Hun 478.

[3] Eiseman v. Judah, (U. S. C. C. West Dist. of Tenn.) 4 Cent. L. Jour. 345.

for in a member's certificate "may be disposed of by his last will and testament, otherwise it shall belong to and be paid to his widow, or in case he leaves no widow, then to the heirs and legal representatives of the deceased, and, in the absence of such will, and in case such member leave no widow, heirs or representatives, such premium shall revert to the company." The court held that the power reserved to the testator under this by-law to dispose of the amount payable at his death was in the nature of a power of appointment, and that the fund would pass only in pursuance of a clause expressing in clear and unmistakable terms the intention of the testator to divert it from the purposes to which, by the by-laws of the association, it was to be devoted.[1]

The charter of a society provided as follows:

"The fund created in section 9 for the benefit of the widow and children of the deceased member, shall be paid to them by said company as soon as it can be collected, or to their trustee, in the discretion of the company, subject, however, to be appropriated for their benefit equally, according to the will of the deceased member; or if he should leave no widow or child, then to be appropriated according to his will, or if he makes no will, and leaves no widow or child, it shall vest, and remain in the company, and be added to its capital stock, or be appropriated as it may deem expedient."

An insured member died leaving no widow and no child, and it was claimed that the contingency therefore existed, in which, under the charter, he had power to dispose of the proceeds of his membership by will, and that he had so disposed of the proceeds by the clause of his will disposing of his residuary estate. But the court held that the charter gave the member a mere power of appointment, in case he had neither wife nor child, that the assured had no interest whatever in the fund, and that, therefore the fund did not pass under a will merely disposing of all his estate, but in which no mention was made of the fund to arise from his membership.[2]

§ 213. Power of appointment continued. A testator, by his will, bequeathed as follows:

"After the payment of all my just debts and funeral expenses by my executor out of my estate, I devise as follows: I give and bequeath the entire residue of my estate to my

[1] Greeno v. Greeno, 23 Hun 478.
[2] Duvall v. Goodson, 79 Ky. 224.

three sisters, E. C. A., M. F. S., and G. R., and my esteemed friend M. V. L., each of them to have and receive a fourth part thereof absolutely."

The testator left neither widow nor children, and, at the time of his death, was a member in good standing of an incorporated mutual benefit society, which, by its charter, provided for the payment of a certain sum of money upon the death of any member, "to the widow, child, children, or such person or persons to whom the deceased may have disposed of the same by will or assignment. If there be no widow, child or children, or the deceased shall have made no disposition by will or assignment of the sum accruing upon his death, then the board shall appropriate such sum as may be necessary for funeral expenses, and all excess of money accruing from the death of such member shall go to the permanent fund of the association."

In construing this provision of the charter, the court held that the fund was not assets of the estate of the deceased member, recoverable by his administrator or executor—that the widow, child or children of the member were the beneficiaries designated by it, subject to the right of the member to appoint other beneficiaries—that this *jus disponendi* given by the charter was a mere power of appointment; and the court further held that the will of the testator was not a valid exercise of the power, since the intention to exercise it was not expressed, and it did not appear that there was no other estate upon which it might operate; that in the absence of a valid exercise of the power, there being no widow, child or children of the deceased, the excess of the fund, after payment of funeral expenses, should go to the permanent fund of the society.[1]

§214. Power of appointment continued. Where the by-laws of a society provide that the benefit fund is to be paid "to the widow, children, mother, sister, father or brother of the deceased member, and in the order named, if not otherwise directed by the member previous to his death," the relatives of the deceased will take the fund in the order named, unless the member, in his life-time, executed such power of direction or appointment, thus changing the order of payment, and the will of a member who died seized of real and personal

[1] Maryland Mutual Benevolent Society, I. O. R. M. v. Clendinen, 44 Md., 429; See Mory, Exc'x. v. Michael, 18 Md., 241.

property, devising and bequeathing to his children "my estate and property, real, personal and mixed," without referring to the power, or the subject of it, is not such an execution of the power as will control the fund; and the other provisions of the section of the by-laws above quoted control the fund, and give it to the widow of the testator, who is named as the first in order, and, therefore, the preferred beneficiary.[1]

Where the constitution of an unincorporated voluntary society provides in effect for the creation of a trust fund, from which, upon the death of a member, a payment of $10,000.00 is directed to be made to such person or objects as he may have designated in writing, or if no such written disposition has been made by him, then to certain specified persons, such fund forms no part of the estate of the deceased member, and his personal representatives cannot maintain an action to recover it.[2]

§215. Power of appointment, contrary doctrine. The charter and constitution of the Knights of Honor declared its object to be "to establish a benefit fund, from which a sum, not to exceed $2,000.00, shall be paid, at the death of each member, to his family, or to be disposed of as he may direct," and the certificate to each beneficiary member provided "that, in accordance with, and under the provisions of the laws governing the order, the sum of $2,000.00 shall be paid, * * * * * as a benefit, upon due notice of his death, to such person or persons as he may by will, or entry in the record book of this lodge, or on the face of this certificate, direct." Chancellor Cooper, in Weil v. Trafford, 3 Tenn. Ch. 108, held that, by the terms of the above contract, the benefit fund belonged to the member's estate, and passed under the residuary clause of his will, disposing of "the balance of all my property of every kind." The learned chancellor quotes the contract, laying particular stress upon the words—"or to be disposed of as he may direct"—"as he may by will direct"—and says: "The right to the fund and the power of the beneficiary to dispose of it in his lifetime, and by will, could not possibly be recognized more clearly."

This decision does not stand in line with the authorities just cited.

[1] Arthur v. Odd Fellows Beneficial Association *et al.*, 27 Ohio State, 557.

[2] Swift v. San Francisco, etc. Board, 67 Cal., 567.

§ 216. When power to designate or change beneficiary is exhausted. Where a by-law of a mutual benefit society provides that any member may, in a certain manner, change his beneficiary, or that he may, in a certain manner, designate the person to whom the benefit fund shall, on his death, be paid, such by-law means that the change or designation may be made from time to time, at the pleasure of the member; and the power of changing or designating the beneficiary is not exhausted by one or more changes or designations.[1]

§ 217. Time within which power of appointment may be exercised. As the beneficiary of a member of a mutual benefit society has no vested right in the certificate of membership, it follows that the power of appointment of a new beneficiary, reserved to the member in the contract of insurance, may be exercised by him at any time during the existence of the contract. In this respect, there is an important difference between the power of appointment reserved to the member in a contract of insurance in a mutual benefit society, and such a power reserved in an ordinary contract of insurance. In the ordinary contract of insurance, the beneficiary has a vested right, and any power of appointment of a new beneficiary, upon a certain contingency, must, upon the happening of the event, be exercised at once, or within a reasonable time.[2]

[1] Deady v. Bank Clerk's Mut. Ben. Association, 17 J. & S. (N. Y. Sup'r. Ct.) 246; Union Mutual v. Montgomery, Mich. 38 N. W. Rep. 588.

[2] It was held in Eiseman v. Judah, 4 Central Law Journal 345, that, where a policy is payable at the death of the insured to his wife, if then living, or if not living, then to her children, with the proviso "that in case of the decease of his wife during the life-time of the assured the said assured may, at his option, substitute any other beneficiary under this policy," such substitution must be made upon the decease of the wife, or within a reasonable time thereafter; it may not be made after the date fixed for the next ensuing payment of premium on the policy. The court says: "All the authorities upon life insurance agree that the rights of the children of the wife, in such cases, become upon the death of their mother, *vested rights*, in the fullest sense of the term. This is not, then, a case in which, like most cases of appointment under a power, no reason can be assigned for an immediate execution of the power, so that the whole life-time of the donee of the power is allowed for its execution. Here, there are reasons for a prompt execution; for, if the power be executed, the rights under the policy already existing are to be taken away. Within what time, then, will the law allow the act of Ackerman to take away the rights thus already vested, by the death of his wife, in her children? This period cannot be indefinite. Justice and equity require that the power thus con-

§ **218, Designation by special direction.** A member of a lodge of the Knights of Honor had issued to him a benefit certificate, in the sum of $2,000.00, to be paid, on his death, to such person or persons as he might, by will, or entry on the record book of the lodge, or on the face of the certificate, direct. Before his marriage, he indorsed upon the certificate, the following: "To the officers and members of the Supreme Lodge, Knights of Honor. Brothers, it is my will that the benefits named in this certificate be paid to my sister, J. H.," to which his name was subscribed, and the same was attested by two witnesses. This indorsement was all printed except the words, "my sister J. H.," but the certificate with the endorsement was never delivered to the sister. His widow claimed that this indorsement was a will which was revoked by his subsequent marriage. The Supreme Court of Illinois held that, in view of the circumstances stated, it could not be regarded as a will, but a special direction to whom the benefit should be paid, in one of the modes authorized by the constitution of the lodge and the certificate.[1]

The charter of a mutual benefit society provided that the beneficiary fund should "be paid over to the families, heirs or representatives of deceased members; or to such person or persons as such deceased members may while living have directed." Authority was also given to regulate such payments by by-law. One of the by-laws directed the fund to be paid to

ferred shall be exercised at some precise time, in order that the fact of its exercise may be duly made known to all persons interested; and no further latitude can be allowed to the donee of the power, than to give him a reasonable time within which he shall act under it, if at all. This reasonable time may well be the period ending with next ensuing payment of premium. At that date the policy will lapse by its own terms, unless a new premium is paid. Such payment will continue the policy in force, and will thus be, in some sense, the making of a new contract.

The beneficiaries may well wish to know whether the policy is to continue in force for their benefit, or whether their interest is to cease. If the divestiture of their rights by the appointment of a new benficiary could be accomplished a year after those rights accrued, it might equally well be postponed for twenty years, during which time the beneficiaries might pay forty semi-annual premiums, instead of one as in this case.

I am constrained to hold the provision for such an appointment, "in case of the decease of the wife" to mean "upon the decease," indicating that event as the proper time; and to treat the time of the next succeeding payment of premium as the latest hour which can equitably be allowed for a divestiture of rights theretofore existing."

[1] Highland v. Highland, 109 Ill. 366; Under the decisions of Tennessee, such a designation might be held to be a will; McLean v. McLean 6 Hump. 452; Tennessee Lodge v. Ladd, 5 Lea. 716.

the person or persons last named by the deceased, and entered by his order on the "will book." The deceased member had had an entry made in the "will book" directing the fund to be paid to his brother. Afterward he made a will by which he gave and devised his interest in said fund, after payment of his just debts and funeral expenses to the same brother. The administrator with the will annexed of the deceased brother brought an action to recover the fund, claiming that the will of the deceased revoked the appointment made in the "will book," and made the fund subject to the payment of the testator's debts.

But the court held that the brother took the fund by virtue of the special designation in the "will book," and that the will was inoperative, and did not subject the fund to payment of the member's debts.[1]

§ 219. Delivery of certificate to beneficiary not necessary. When a member of a society has appointed a beneficiary in any of the modes pointed out in the contract of insurance, it is not necessary that the certificate of membership should be delivered to the beneficiary so named. The claim of the beneficiary, in such a case, is not based on a contract, but upon the appointment and direction for the payment of the fund.

Where the benefit certificate of a member was made payable at his death to such person as he should direct on the face of the certificate, and the member, on the face of the certificate, directed that the benefit fund should be paid to a certain person, and retained possession of the certificate until his death, it was held that the beneficiary so designated took the fund by appointment, and that no delivery of the certificate in the life time of the member was necessary.[2]

[1] Bown v. Catholic Mutual etc., 33 Hun (N. Y.) 263.

[2] Highland v. Highland, 109 Ill., 366; 13 Ill. App., 510.

Designation of Beneficiary.—Part II.

CHANGE OF BENEFICIARY.

SEC. 220. Provisions of the charter concerning changes of beneficiaries.
SEC. 221. } SEC. 222. } Provisions of the by-laws concerning changes of beneficiaries.
SEC. 223. } SEC. 226. } Authorities holding such provisions of the by-laws to be mandatory and exclusive.
SEC. 227. } SEC. 228. } Authorities holding such provisions of the by-laws to be directory merely.
SEC. 229. When the society will be deemed to have waived defects in the form of the designation adopted by a member.
SEC. 230. Inoperative change of beneficiary does not revoke original designation.
SEC. 231. Fraudulent change of beneficiary.

§ 220. Provisions of charter concerning changes of beneficiaries. When the charter provides the manner and mode of designating or changing the beneficiary, and the extent to which such changes may be made, these provisions must be strictly complied with, on the familiar ground that a corporation is the creature of its charter, and it is not within the power of the corporation or its members, or both, to waive a strict compliance with the requirements thereof.[1]

§ 221. Provisions of by-laws concerning changes of beneficiaries. When a mutual benefit society has adopted, by its by-laws, a particular method of changing a beneficiary, under the powers and within the limits of its charter, no change of beneficiary can be made in any other mode or manner.

The reason for this rule is not difficult to discover. It is based upon the familiar maxim that the expression of one thing excludes other and different things.

[1] Head v. Providence Ins. Co., 2 Cranch, 127; 1 Phillip's Insurance, p. 9; Leonard v. American Ins. Co., 97 Ind., 299.

When a society frames a set of rules providing for the distribution of a fund, and for the rights of beneficiaries and members, it must be assumed that it excludes every other mode and manner. Any other conclusion would lead to the most interminable confusion in the law applicable to the distribution of such funds, and fritter away funds created for the benefit of widows, orphans and heirs, in the expenses of uncertain litigation. But there is still another reason. It cannot be said that a beneficiary named in a certificate has no rights therein because he has no vested rights. The beneficiary has a right to the proceeds of the certificate of insurance, subject to the right of the member to change the beneficiary, according to the terms of the by-laws and regulations of the society, which are a part of the contract of insurance; and the right of the beneficiary to have this contract carried out in the manner provided for is as binding upon the member as his right to change the beneficiary is binding upon the beneficiary and the society.[1] The power reserved to the member to change the beneficiary qualifies the rights of the beneficiary in the contract. It makes the interest of the beneficiary a mere expectancy while the power to revoke the appointment as beneficiary of the contract continues; but this expectancy becomes an absolute right upon the death of the member, unless he has, in the manner prescribed, defeated it by the affirmative act of changing the beneficiary.

§ 222. **Provisions of by-laws continued.** It cannot truly be said that the interests of a beneficiary may be brought to an end at any time, at the will of a member. It requires more than the will and the intention of the member to accomplish the change.

A contract of insurance required that any member desiring to make a direction as to payment of the benefit fund, different from that stated in the certificate, might do so in a prescribed form, to be attested by the recorder of the lodge, and reported to the grand lodge, upon the surrender of the old certificate.

A member, believing himself dying, and desiring to change the designation from his sister to his wife, told a friend that he wished this change to be made, and asked him to have the forms gone through with. Before anything was actually done

[1] Coleman v. Supreme Lodge K. of H., 18 Mo. App., 189; Holland, Guardian v. Taylor *et al.*, 111 Ind., 121; 12 N. E. Rep., 116.

he died, and the benefit fund was declared to be the property of the sister.[1]

It requires some affirmative act on the part of the member to change the designation; his will and intention will not work the change. All tendency to confusion and uncertainty is avoided by requiring this change to be made in conformity with the terms of the contract.

The authorities on this point are conflicting, but this seems to be the better rule.

§ 223. Authorities holding such provisions of the by-laws to be mandatory and exclusive. The by-laws of the Knights of Honor provided that a member who desired to change the beneficiary named by him, might surrender his certificate, and procure a new certificate to be issued to the new beneficiary, on payment of a fee of fifty cents. A member just before his death gave the following direction:

"*To Herman Lodge, etc., Knights of Honor:*

OFFICERS AND MEMBERS: Please take notice that I do hereby revoke the direction given in my benefit certificate in reference as to whom the money should, after my death, be paid, and I do hereby order and direct that the money be divided as directed by me in my last will and testament, executed by me on the 17th of October, 1882."

This direction was signed by the member. The court held that a change of beneficiary could only be made by a compliance with the rules of the society, and that the above direction and the will of the member were inoperative.[2]

A by-law of the Supreme Lodge of Knights of Honor provided as follows:

"A member may, at any time, while in good standing, surrender his benefit certificate, which, together with a fee of fifty cents, shall be forwarded by the reporter of his lodge under seal to the supreme reporter, who shall thereupon cancel the old certificate and issue a new one in lieu thereof to such member, payable as he shall have directed, * * * * provided, no benefit certificate shall be reissued, except as herein provided, unless satisfactory proof of loss of the former benefit certificate is furnished the supreme reporter. When a second certificate is issued, the first one shall be void."

[1] Ireland v. Ireland, 25 N. Y., Weekly Dig., 335.

[2] Renk v. Herman Lodge, 2 Demarest (N. Y.) 409.

A member took out a benefit certificate payable to his wife, and delivered it to her. Just prior to his death, desiring to change the disposition made of his benefit, he gave notice to the officers of the subordinate lodge, of which he was a member. In that notice he stated that he surrendered the former certificate, and requested that a new one be made out and delivered to him, payable to plaintiffs. The old benefit certificate remained in possession of his wife; he never demanded it of her; his offer to surrender was not accompanied with the certificate itself, and there was no pretense that it was lost.

Prior to the institution of the suit, the society paid the widow the benefit fund on the old certificate which she thereupon surrendered to the society. Plaintiffs brought suit as beneficiaries of the new certificate. The court held that as the change of beneficiaries had not been made in the manner prescribed by the by-laws, the rights of the original beneficiary had not been affected, and that the society was not liable to the beneficiaries on the new certificate.[1]

A by-law of the Royal Arcanum provided as follows:

"A member may at any time, when in good standing, surrender his benefit certificate, and a new certificate shall thereafter be issued, payable to such beneficiary or beneficiaries dependent upon him as such member may direct."

The assured did not surrender his certificate, but made a will in which he directed the money due thereon to be paid to others than the beneficiary named therein.

The Supreme Court of Indiana held that, in the absence of any provision in the certificate or by-laws authorizing the assured to change the beneficiary otherwise than by surrender of the certificate, the designation by will was inoperative, and the beneficiary named in the certificate was entitled to the proceeds thereof.[2]

§ **224. Authorities continued.** A. was a member of a benevolent association which paid, upon the death of a member, a sum of money to his wife, or to his children, or if he left neither wife nor children, to such person "as he may have formally designated to his said lodge prior to his decease." A., who had neither wife nor children, formally designated his mother, who died before A.'s death. By his will he had designated his brother as the person who was to receive the benefit,

[1] Coleman v. Supreme Lodge K. of H. 18 Mo. App. 189.

[2] Holland, Guardian v. Taylor *et al.* 111 Ind. 121; 12 N.E. Rep. 116.

but the court held that this was not such a designation as was contemplated, and that the benefit lapsed to the society.[1]

The beneficiary article of a society provided that any member desiring, at any time, to make a new direction as to the payment of his benefit fund, might do so by authorizing such change in writing on the back of his certificate in the form prescribed, which was printed on the back of each certificate, attested by the recorder, with the seal of the lodge attached, and by the payment to the grand lodge of the sum of fifty cents. A member did not make a change in the beneficiary of his certificate as provided, but attempted in his last will to designate a new beneficiary, but the court held that, in making a new direction of payment and designation of beneficiary, the prescribed form must be followed, and that the will was inoperative as to such direction and designation.[2]

§ **225. Authorities continued.** An association, organized under the laws of Kansas, for the purpose of giving aid to the widows, orphans and dependents of deceased members, issued a certificate of membership payable to the member's wife, or her legal representatives. The wife died in the lifetime of the member. In the by-laws and certificate of membership no provision was made for a change of beneficiary, but section 76, chapter 93, Laws of Kansas, 1871, provides that "in case any life insurance company organized under the laws of this state shall have issued, or may hereafter issue, any policy of insurance upon the life of any person or persons for another's benefit, and such beneficiary dies during the lifetime of the person or persons whose life or lives are assured by said insurance policy or policies, then it shall be lawful for such company to receive from the person or persons whose lives are assured, an affidavit, setting forth the facts in the case; and if it shall appear from such affidavit that the affiants have theretofore paid the annual premium on such policy or policies, and intended thereby to insure for the benefit of the person or persons named in such policy or policies as beneficiary, that such person or persons are dead, and that said policy or policies have not been assigned or transferred to any person or persons, and nominating or appointing some

[1] Hellenberg v. District No. 1 etc. 94 N. Y 580.

[2] Vollman's Appeal 92 Pa. St. 50. See also Stephenson v. Stephenson 64 Iowa 534; 21 N. W. Rep. 19; Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826; Renk v. Herman Lodge etc., 2 Demarest (N. Y.) 409.

other person or persons as beneficiary in place of the said deceased in said policy or policies named, it shall then be the duty of said insurance company to take up and cancel said policies, at the request of said assured, and issue in like terms another policy or policies upon the life or lives of said insured for the benefit of the beneficiary in said affidavit nominated."

The member after the death of his wife made no affidavit as prescribed in said section, nor did he take any steps to appoint any person as beneficiary in place of his deceased wife, except that he undertook to dispose of the benefit arising from his membership by will.

The Supreme Court of Kansas held that the will was ineffectual to dispose of the money payable on account of his death, or to divert the same from the legal representatives of his deceased wife, and, in deciding the question, said:

"This statute applies to the defendant society. It was enacted prior to the making of the contract in question, and the parties must be held to have contracted with reference to it. It prescribes the manner by which the member may designate a beneficiary where the one first appointed has deceased; and it appears to be the only mode prescribed. We think the maxim, *expressio unius est exclusio alterius*, applies; and, as the prescribed mode has not been followed, no change was actually made, and therefore the benefit must be paid according to the terms of the contract. The assured has no interest in the benefit resulting from his membership. In no event was it payable to him, nor could it become a part of his estate; and, having no interest in the fund, what was there for him to bequeath?"[1]

§ **226. Authorities continued.** Where the constitution of a society prescribes the method by which the beneficiary named in a certificate of membership may be changed, this is a part of the contract of insurance, and the member cannot make any change of beneficiaries, except by complying with this method. The beneficiary of a contract of insurance, who is affected by an attempted change of beneficiaries, may avail himself of the failure of the insured to comply with the contract, as well as the company with whom it is made.[2]

The by-laws of a society provided that a member might change his beneficiary by surrendering his certificate, and re-

[1] Olmstead v. Masonic Mut. Ben. Soc., Kans.; 14 Pac. Rep. 449.

[2] Wendt v. Iowa Legion of Honor. Iowa; 34 N. W. Rep. 470.

ceiving a new one payable according to his directions, "said surrender and directions to be made on the back of the benefit certificate surrendered, signed by the member, and attested by the reporter under seal of the lodge." The printed form on the back of a member's certificate was filled up and signed by him, making it payable to another person than the one named in the certificate, but it was not attested by the reporter. After the death of the member, the certificate was found thus endorsed among his papers together with a letter as follows:

"PORT HURON, MARCH 25, 1884.

Reporter of Integrity Lodge, Knights of Honor.

SIR:—I desire to have the beneficiary in my certificate of membership changed from Mrs. F. F. Richardson to George K. Nairn, in trust; and in the event of my death, two thousand dollars to be paid to him. HARRY TRAVER."

Upon these facts, the Supreme Court of Michigan said: "In our opinion, Traver never surrendered this certificate, and never attempted to surrender it, within either the letter or the spirit of its conditions, and the right of Mrs. Richardson remains as originally provided for. * * * * We dispose of the case purely on legal grounds, which leave us, in our opinion, no choice in the matter. The contract is one which the parties made on their own conditions, and every one is bound by them." [1]

A certificate of membership in the Knights of Honor stipulated that the supreme lodge would pay a certain sum of money to such person or persons as the member might, by will, or entry on the record of the lodge, or on the face of the certificate direct the same to be paid, etc. On the face of the certificate the member directed that the fund be paid to his sister. There was found in the pocket of the member the day before his death, the following writing signed by the member:

" *To my Dear Wife*;

I want you to have all my effects, everything. I give everything to my wife."

The Supreme Court of Illinois held that, as the member had by previous indorsement disposed of the benefit fund by directing to whom it should be paid, in the precise mode in which the rules of the lodge required the direction should be

[1] Supreme Lodge v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826.

made, this writing addressed to the wife did not operate to dispose of the benefit.[1]

§ 227. Authorities holding such provisions of the by-laws to be directory merely. As has been said, the authorites are not by any means unanimous on this point, and those holding that such prescribed methods are directory merely are here given.

A by-law of the American Legion of Honor provided:

"Members may at any time, when in good standing, surrender their certificate, and have a new one issued, payable to such beneficiary or beneficiaries dependent upon them as they may direct, upon payment of a certificate fee of fifty cents." A member took out a policy payable to his father and mother. Without attempting to make any change of beneficiaries as provided in this by-law, he made a will bequeathing the proceeds of his certificate to his wife and children, and soon afterward died. The benefit fund was, by agreement of parties, placed in bank by the association, subject to the judgment of the court in the suit between the father and mother, on the one hand, and the executors of the will and guardians of the children, on the other hand. In discussing the above by-law and its effect on the change of beneficiaries, the court says:

"A method by which he may accomplish the change to the satisfaction of the order is pointed out in the section last recited, but we do not consider this as exclusive of all other ways of effecting the same object. The design of this section is to protect the interests of the corporation. The company are entitled to know who are the parties entitled to the benefit money, and this is an effectual and certain means of giving that information. But, like all such provisions in the by-laws of private corporations, it may be waived at the option of the corporation, being for its benefit alone. * * * * * As a by-law of the order, this provision entered into the understanding between the company and the member, effecting the insurance, and the rights of interested parties are not strengthened by the fact that the same provision is found in the certificate. It is still a condition for the benefit of the company, to be insisted upon or waived according to their election.

The provision in the by-laws of the Legion of Honor as to changing the beneficiaries of a benefit certificate is not per-

[1] Highland v. Highland, 109 Ill. 366; See Elsey v. Odd Fellows etc. Mass. 7 N. E. Rep. 844.

emptory, but merely points out a method which shall satisfy the company as to the parties entitled to receive the benefit money. The suit is not between the claimant of this money and the corporation by whom it is to be paid, and the latter does not object to the manner in which the change of beneficiaries was made. The exact case before us seems to be one of first impression; we have been furnished with no authorities precisely in point by the able and distinguished counsel who have represented the respective parties to the cause, although their briefs show great research for that purpose, nor have we been able to find any bearing upon the question. * * We think that as between the parties to this suit the change of beneficiaries was fully effected by the will." [1]

§ **228. Authorities continued.** In Lamont v. Hotel Men's Mut. Ben. Association, 30 Fed. Rep. 817, Judge Blodgett held that, where, under the articles of association and by-laws of a mutual benefit society, the benefits are payable to the person designated by the member in his application for membership, or his last will and testament, it is competent for such member by his own act, and with the consent of the company, at any time before his death, without the formalities of a will, to make a transfer of the benefit from the original beneficiary named to any other person he may select. In this case the learned judge neither cites authorities, nor gives the reasons upon which his decision is founded.

In Manning v. A. O. U. W., Ky.; 5 S. W. Rep. 385, the contract provided that the beneficiary might be changed by proper authorization on the back of the certificate, or by the surrender of the old certificate, and the issue of a new one. The member married subsequent to the issue of his certificate, and wrote to the proper officer: "Please find enclosed my dues of Lodge No. 2, A. O. U. W., three dollars; and in return please send my policy made out to Mrs. Josie A. Manning." The member neglected to forward the requisite fee of fifty cents for making the change, and the proper officer of the lodge wrote to him, requesting him to furnish it He died without having done so, and nothing was done in the matter prior to the member's death. Afterward the society issued to Josie A. Manning a certificate, and paid her the fund provided for. The court says: "The intention of the assured was to change the benefit. He so directed in writing, and, now,

[1] Splawn v. Chew, 60 Texas 532.

because he did not do so in the formal manner prescribed by the law for the benefit of the order, it is asked by a third party whose interest in the insurance was liable to end at any time at the will of the assured, that his intention shall be defeated, although the party for whose benefit the form was prescribed, has seen proper to waive it. Such a rule would sacrifice substantial justice to mere form; it would tend to defeat the benevolent aim and purpose of the organization, and the desire and intention of the assured. Members of the order may be remote from their lodge; they may not have their certificates with them, and, therefore, be unable to make the indorsement thereon as directed, or to have it attested by the recorder of their lodge, or its seal attached thereto. If appellee chooses to waive these formalities, it does not lie in the mouth of a third party to complain."

A member took a certificate of membership in a society, which, among other things, contained the following: "In accordance with the provisions and laws governing said association, a sum, not exceeding $2,000, will be paid by the association as a benefit, upon due notice of his death, and surrender of this certificate, to such person or persons as he may by entry on the record book of the association, or on the face of this certificate, direct," etc.

At the date of the issue of this certificate the name of his wife was entered on the record book of the society as the person to whom the benefit was to be paid upon his death. Afterward the member surrendered this certificate to the society, and procured a new one to be issued payable to his parents.

On the ground that the wife had no vested interest in the original certificate, the court held that the surrender of it to the society, and the procurement of a new one payable to other persons, was a valid change of beneficiaries.[1]

§229. When the society will be deemed to waived defects in the form of the designation adopted by a member. The question as to the validity of a change made in the designation of a beneficiary has, so far, been discussed with reference to the rights of the person first designated.

Another state of facts may arise, and the conflict of interest

[1] Barton v. Relief Ass'n, 63 N. H. 535; see also Swift v. Benefit Association, 96 Ill. 309; See "Equitable Assignment" at section 193.

may be between the person in whose favor the designation was changed, and the society itself.

Where the benefit fund will lapse to the society on failure of the member to designate a beneficiary to receive it, the officers of the society, by recognizing and acquiescing in a change of the beneficiary which is not in conformity with the rules and provisions of the contract, may estop the society from claiming the benefit fund on account of the invalidity of the change.

A member of a mutual benefit society received a certificate payable to his wife, whom he had married many years before. At the time of the marriage she had a daughter who afterward lived with them, but they had no children. After the death of the wife, which occurred a few months after the issuing of the certificate, the member made a will, by which he left to his step-daughter all his property. His property consisted of his clothes, a little furniture and the insurance in question. After the will was drawn he caused a friend to write a letter on the back of it to one of the principal officers of the lodge, and delivered the will to him. He also told the reporter of the lodge of the contents of the will, and of his understanding that it conveyed his insurance to his step-daughter. After the death of the member, the society refused to pay the step-daughter, who had proved the will, upon the ground that the member had not complied with the requirements of an article of its constitution providing that, "in the event of the death of all the beneficiaries designated by the member, before the decease of such member, if he shall make no other disposition thereof, the benefit shall be paid to the heirs of the deceased member, and if no person shall be entitled to receive such benefit, by the laws of the order, it shall revert to the widow and orphan benefit fund." So far as appeared the member had no relations, and the society claimed that the death benefit lapsed to the "widow and orphan benefit fund." Upon these facts the court said: "The delivery of the will to Osborn, the proper officer of the lodge, and the contemporaneous statements made by the assured to Boyer, the reporter of the lodge, and the retention of the will by said lodge without any objection to the form or manner of designation, constitute a waiver of any defect or irregularity in such designation or disposition. If the paper was regarded as imperfect, it was the duty of the officers of the lodge to return it to the assured with notice of the defect." [1]

[1] Kepler v. Supreme Lodge, K. of H., 45 Hun (N. Y.) 274.

§ 230. Inoperative change of beneficiary does not revoke original designation. Where a member has, in conformity with the law of the society, designated the person to whom the fund shall, at his death, be paid, this original designation will remain in force, unless a valid and legal change is made in the designation of beneficiaries. An attempted change which is, for any reason, inoperative, invalid or illegal, does not operate as a revocation of the original designation.

The Supreme Court of Massachusetts, in Elsey v. Odd Fellows' Mutual Relief Association *et al.* Mass.; 7 N. E. Rep. 844, says: "As the assignment to the mother was invalid, we think the original designation to the wife remained in force. We can see no reason to suppose that the later assignment was intended to operate as a revocation of the designation to the wife, unless it took effect as a designation to the mother. The scheme of the by-laws is that the beneficiary shall be designated by the member in his application for membership, and the benefit shall be paid to such beneficiary, unless there is a subsequent legal assignment. They make no provision for revoking a designation except by a legal assignment to some other person, assented to by the directors. We cannot presume that the deceased member intended his assignment to operate as a revocation of the previous designation in the event of its invalidity as an assignment to his mother, and there is no assent of the directors to any such revocation."

§ 231. Fraudulent change of beneficiary. When the beneficiary has no vested right in the benefit fund, a change of beneficiary works no fraud upon the original beneficiary, or those claiming through or under him.

One who has an insurable interest in the life of the member has a right to use all the persuasive arts at his command to induce the member to make him the beneficiary of his certificate.[1]

A member of a mutual benefit society, knowing that the beneficiary named in his certificate is greatly indebted, may, in accordance with the laws and regulations of the society, change the beneficiary entirely, or make the fund payable to a person in trust for the original beneficiary, and such change will constitute no fraud upon the original beneficiary or his creditors.[2]

[1] Pingree v. Jones, 80 Ill. 181.

[2] Schillinger v. Boes, etc , Ky. 3 S. W. Rep. 427.

Designation of Beneficiary. Part III.

CONSTRUCTION OF DESIGNATION, ETC.

SEC. 232. }
SEC. 235. } Provisions of charter—charter beneficiaries.
SEC. 236. "As designated in last will."
SEC. 237. "Devisees."
SEC. 238. }
SEC. 240. } "Widows."
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SEC. 242. Benefit fund payable to wife "for the benefit of herself and the children of said member."
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SEC. 244. } "Wife and children."
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SEC. 266a. "Survivor."
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SEC. 268. "Guardian" of member.
SEC. 269. Reformation of certificate—inserting name of beneficiary.
SEC. 270. Incomplete designation.
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SEC. 272. } Where no designation is made.

Sec. 232. Provisions of charter—charter beneficiaries. It is customary for mutual benefit societies to provide in their charters, by-laws, or certificates of membership, how the benefit fund shall be disposed of, in case no designation shall be made by the member, or in case the desig-

nated beneficiary shall die, or be from any cause incapable of taking the fund. These provisions are a part of the contract of insurance, and in construing the meaning of a designation made by a member, or in seeking to determine who is entitled to the benefit fund, they must often be looked to as an important element of the question.

The laws adopted by a mutual benefit society determine the rights of the members and the society; and a benefit fund which is to be paid to the family or heirs of a deceased member, unless otherwise directed by such member in his life-time, will, on failure of the member to give such direction, be controlled by such laws.

Where, by the laws of a society, the benefit fund is to be paid "to the widow, children, mother, sister, father or brother of a deceased member, and in the order named, if not otherwise directed by the member previous to his death," the relatives will take the fund in the order named, unless the member in his life-time executed such power of direction, thus changing the order of payment.[1]

Where the charter of a mutual benefit society provides that the benefit fund shall, upon the death of a member, be paid to his widow and children, they are entitled to the fund, although another person is named in the certificate of membership as the beneficiary, and has paid all the assessments levied upon the member. The certificate must, in such a case, be construed in connection with the charter as a contract to pay to the widow and children of the member the amount of the insurance. If, for instance, a certificate in such a society is made payable to a creditor of the member, it is not void, but, the designation in the certificate alone being void, there remains a valid and subsisting contract of insurance, under the terms of the charter, in favor of the widow and children of the member.[2]

§ **233. Same subject continued.** By the provisions of the by-laws of an association, a member in good standing might surrender his certificate and have a new one issued, payable to such beneficiaries dependent upon him, as he might direct, and in the event of the death of the beneficiary named,

[1] Arthur v. Odd Fellow Ben. Association, 29 O. St. 557.

[2] Ky. Grangers' Mut. Ben. Soc. v. McGregor, 7 Ky. L. Rep. (Sup'r Ct.) 550; Gibson v. Ky. Granger's Mut. Ben. Society, 8 Ky. L. Rep. (Sup'r Ct.) 520; See Rindge v. N. E. Mutual Aid Society, Mass. 15 N. E. Rep. 628; See "Recovery of assessments."

and no other disposition being made, the benefit was to go to the dependent heirs of the deceased member.

An insured member died. He left a will bequeathing the benefit fund to a person to whom he was engaged to be married, but to whose support he had contributed nothing, and who was not dependent upon him. He died without marrying this person, and left his mother, who was dependent upon him, as his next of kin. It was held, under these facts, that the disposal of the fund by will being invalid, the mother was entitled to it.[1]

The object of a society was "to establish a widows' and orphans' fund" for the payment of a certain sum, on the death of a member, "to his family and those dependent upon him, as he may direct." A by-law provided that in case a member fails to direct, "by will, entry or benefit certificate," who shall receive such benefit, "the council shall cause the same to be paid to the person or persons entitled thereto," etc. A member designated his children as beneficiaries. They died a short time before the father, and he gave no other direction, and left no children or other persons dependent upon him for support, except his widow; and the court held that the widow was entitled to the benefit fund.[2]

Where the charter of a mutual benefit society provides for the payment to the member's family or appointee, of a certain sum of money upon the member's death, and that, "in case no direction is made by a brother, the same shall be paid to the person or persons entitled thereto," upon the death of a member, without having named a beneficiary, the benefits are payable to the wife and children, and not to the administrator, of the deceased member.[3]

§ **234. Charter beneficiaries continued.** A member was, at the time of his death, in good standing in an association, the object of which was, as declared by its charter, "to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee or legatee of a deceased member." By a provision of one of the by-laws, if a deceased member had no *legal representatives*, the fund should become the property of the association. He had named his first wife, A. R. as the bene-

[1] Supreme Council v. Perry *et al*, 137 Mass. 580.

[2] Ballou v. Gile, Adm'r., 50 Wis. 614.

[3] Fenn v. Lewis, 81 Mo. 259; affirming 10 Mo. App. 478.

ficiary of his certificate, and she died. He married again, and died intestate without children, leaving his second wife. He never made another designation of a beneficiary, after he took out his certificate.

Three separate claims were made to the fund; first, by the representatives of the first wife; second, by the representatives of the husband; third, by the surviving widow. Whereupon the association filed a bill of interpleader, making these partie defendants that they might establish their several claims to the fund. The court held that the representatives of the first wife were not entitled to the fund. And it was held that the term *legal representatives* in the by-law, providing that "if a member has no legal representatives, such sum of money as they would have been entitled to, shall become the property of the association," is to be taken as meaning those who are legal representatives in the contemplation of the charter and by-laws, to wit: the persons named, "the widow, orphans, heir or legatee."

The court says: "The fund is to go to some one of these parties. They are mentioned disjunctively; the money is to be paid to the widow, or the orphans, or the heir, or the assignee or legatee. Now, that means one of two things, either that it shall go to some one of these, to be selected by some authority, or else that they are to have precedence in the order in which they are named. But there is no authority provided for, or indicated in either the charter or the by-laws, by whom any one of these beneficiaries shall be selected; and, therefore, our conclusion is that the order in which they are named is the order in which they are to benefit by this fund; first the widow; if there is no widow, then the orphans; if there is no orphan, then the heir, etc. In this case the question is between the widow and the personal representatives. The latter are excluded entirely by our construction of the by-laws, and therefore, the decree will be that the widow shall take the fund."[1]

§ 235. Charter beneficiaries continued. In McClure v. Johnson, 56 Iowa, 620, the benefit fund was made payable to the "wife, husband, children, mother, sister, father or brother of such deceased member, and in the order above named," by the provisions of a by-law of the society, and

[1] Relief Association v. McAuley, 2 Mackey D. C. 70.

there was no provision of the contract of insurance, authorizing any other disposition of the fund.

A member left a will by which he directed that the fund should be paid to a creditor, but the court held that he had no right to change the beneficiary, and that, under this by-law, his widow was entitled to the fund.

Where the charter of a mutual benefit society provides that the fund due upon the death of a member shall be paid to his widow and children, and only gives the member the power to designate by will in what proportion it shall be divided between them, there can be no assignment of a certificate or change in the beneficiary which will divest the widow and children of their rights,[1]

The charter of a society provided: "Upon the decease of any member of this association, the fund to which his family is entitled shall be paid as may be designated in the application for membership; this being changed by death, or otherwise impossible, it shall go—first—to the widow and infant children," etc.

A member designated, as his beneficiary, his brother, who afterward died on March 7, 1880. The member died May 26, 1880, intestate and childless. His widow, and not his administrator, was entitled to the benefit fund.[2]

§ 236. "As designated in last will." The charter of a mutual benefit society provided in its sixth section that, upon the decease of any member of the association, "the fund to which his family is entitled shall be paid as may be designated in the application for membership. This being changed by death, or otherwise impossible, it shall go first to the widow and infant children," and afterward in the order named. A member directed in his application that the benefit should be paid at his death as he might designate in his will. He died intestate, leaving a widow, but no infant children.

The court held that the widow was entitled to the fund, and, in so deciding, says:

"Appellants contend that this section (above quoted) applies only where a designation is made, and subsequent events render it impossible of fulfillment. But we think it has a broader and more comprehensive meaning, and that it applies

[1] Ky. Grangers' Mut. Ben, Soc. v. Howe, 9 Ky. Law Rep. (Supr. Ct.) 198.

[2] Van Bibber's Adm'r. v. Van Bibber, 82 Ky., 347, affirming 5 Ky., Law. Rep., 182.

as well where, by reason of the failure of the insured to make any designation at all, it becomes impossible to pay according to his direction, as in case of the death of a designated beneficiary; for, according to what seems to us the true construction of the language used, it is only in those cases where, pursuant to the charter, the insured has expressly directed otherwise, that the fund is not payable as pointed out by the terms of the sixth section." [1]

The Covenant Mutual Benefit Association issued a certificate of membership, and agreed therein that, on the death of the member in good standing, it would cause an assessment to be made upon its members, and would pay the proceeds of such assessment, not exceeding $2,500.00, "as a benefit to his devisees, as provided in his last will and testament, or in the event of their prior death, to the legal heirs or devisees of the holders of this certificate." The member died in good standing and intestate.

Judge Dyer (U. S. Circuit Court, E. D. Wisconsin), in construing this contract, said: "The insured might die intestate. It could not have been in contemplation of the parties that, in that event, there was to be no beneficiary entitled to sue upon the contract. The certificate, fairly and reasonably construed, means, we think, that if the insured should choose to make a last will in which devisees should be named, then such devisees were to become the beneficiaries entitled to receive and recover the sum collected by assessment on account of the certificate. But no obligation was imposed upon the insured to make a last will. He might, if he chose, leave his estate to be divided among legal heirs as the law should direct its division, and, in that event, as no devisees would exist, the benefits of the certificate would accrue to the heirs. In other words, the effect of the contract is that if the insured has made no will, and if, therefore, no devisees are in existence, his legal heirs shall become the beneficiaries entitled to enforce payment in a suit upon the certificate. This view of the rights of the parties accords with the sense and meaning of the contract." [2]

A mutual benefit society issued a certificate of membership in which it agreed to pay, or cause to be paid "as a benefit to the member's devisees, as provided in his last will and testament, or in the event of their prior death, to the legal heir or devisees of the certificate holder" the amount derived from an

[1] Whitehurst v. Whitehurst, Va., 1 S. E. Rep., 801.

[2] Smith *et al.* v. Covenant, etc., Ass'n., 24 Fed. Rep., 685.

assessment upon its members. In construing this contract the court says:

"The substantial promise was to pay to devisees, if there were devisees to take, and, if not, then to pay to heirs. We think this the fair and reasonable construction of the agreement, which, in view of the purpose of the association, may well be adopted."[1]

§ **237. Devisees.** A certificate of insurance was issued by a society organized under the laws of Illinois for the purpose of securing "pecuniary benefits to widows, orphans, heirs, relatives and devisees of deceased members," and was made payable "to the devisees of Philip H. Worley." Worley died intestate, and suit was brought on the certificate by the administrator of Worley's estate, in the U. S. Circuit Court for District of Iowa. So far as appears from the reported case, no provision was made by the society, designating a beneficiary in case the member should fail to make a designation—except as the express purpose of the law above quoted might be construed into such a provision.

Judges McCrary and Love held that the certificate was not a part of the assets of the estate, and not recoverable as such by his administrator. Expressions in the opinion of the court indicate that, in the view taken of the case, no recovery could be had upon the certificate. It was there said that neither the decedant nor the defendant corporation intended by their contract to provide for the widows, orphans, heirs or creditors of the decedent, but only for his devisees, and, as there were no devisees, there was no beneficiary in existence who could enforce the contract—that, as in no contingency, was the insurance to be paid to any other persons than devisees, the expression of one thing excludes other and different things; that the designation of devisees in the contract excluded the other classes — the widow, orphans, heirs and creditors.[2]

§ **238. Widow.** The by-laws of a society provide that "the sum due upon the policy of a deceased member of the company, shall be paid to the widow * * * * for the use of herself and the dependent children of the deceased." They declare the intention to be, to keep from want the families of its members, and to keep them from becoming a burden to the society; and they provide that, "in no case shall a mem-

[1] Covenant Mut. Ben. Ass'n. v. Sears, 114 Ill., 108.

[2] Worley Adm'r v. N.W. Masonic Aid Ass'n, 10 Fed. Rep. 227.

ber dispose of his policy by will or otherwise, so as to deprive his widow or his dependent children of its benefits."

A member gave, by will, $1,000 of his policy to his wife, and the remainder, about $3,000, to his infant son, for his education, etc. The widow, after the death of the member, dissented from the will, and claimed, as the proper construction of the policy, that the sum due upon it must be equally divided between herself and the child, share and share alike; that the testator had no power otherwise to dispose of it.

But the court held otherwise, and said: "Where the member leaves a wife and dependent children, the money must go to their support, according to their necessities, so as to keep them from being a burden to the brotherhood; and as one may be more dependent than another, there must be a reasonable discretion in the member to make such discriminations as will effect the main purpose of the policy; and the division need not be made share and share alike. This construction is strengthened by the fact, that when the member leaves no widow, and his family is broken up, then the money is directed to be divided out among his children or other relations, 'share and share alike,' but there is no such direction, if there is a widow. We do not see any unreasonable exercise of this discretion on the part of the testator." (It was admitted that the widow had a separate estate of $2,000 worth of land) "The widow was otherwise provided for to an amount which, if added to the $1,000 given in the will, would make her more than equal with the child; and the child has to be educated. The widow having already received the $1,000 left in the will, she is not entitled to any more."[1]

§ **239. "Widow" continued.** One Bolton, in 1847, deserted his wife, and in 1862, so far as the forms of law are concerned, married another woman, with whom he lived and cohabited, until he died in June, 1879. In October, 1877, Bolton became a member of a mutual benefit society, and in August, 1878, he became a member of another such society, in each of which he continued in good standing until his decease. By the terms of his membership in these societies the benefit fund was "payable to the widow of the deceased member."

After the death of the member, the woman with whom he went through the forms of marriage in 1862, collected the benefit fund in each society, and the wife, whom he had de-

[1] Roberts v. Roberts, Ex'r etc. 64 N. C. 695.

serted, afterward brought an action to recover from her the sums received by her as benefits from the societies.

The Supreme Court of Maine, held, that, the contract being in writing and unambiguous, and being in terms payable to the widow, the legal widow was entitled to the benefit funds; and that no evidence *dehors* the written contract, was admissible to vary its construction and show that the woman with whom the deceased member went through the form of marriage, and cohabited, was intended.[1] The authorities cited by the court relate to testamentary devises, and, in explanation of that fact, the court says: "But even if this rule of construction governing wills be different from that of other instruments in respect to the question under examination, it is a sufficient answer that a contract of life insurance like those in question, while it is not a testament, is in the nature of a testament; and, in construing it, the courts should treat it, so far as possible, as a will.[2]

§ 240. **"Widow" continued.** On the 5th of July, 1870, the Locomotive Engineer Mutual Life Insurance Association issued to H. M. Case a certificate of membership. At the foot thereof, and underneath the signature, appeared the following: "All payments or benefits that may accrue or become due to the heirs of the person insured by virtue of this policy will be payable to Mrs. H. M. Case or lawful heirs." At the time this certificate was issued to H. M. Case he had a wife living by the name of Amelia M. Case, and a daughter by the name of Inez H. Case. His wife, Amelia M., died Sept. 12, 1878, and subsequently, and on the 3d day of February, 1882, he was again married. Subsequently, and on May 29, 1885, he died, leaving Emma (his second wife), his widow, and Inez H., his only child and heir-at-law, surviving him. The daughter sued the society for the benefit fund. The society paid into court the sum of $2,922.55 as the amount of benefits due under the certificate, and the widow, Emma, was made defendant.

The court says: "The question presented is whether the

[1] Bolton v. Bolton, 73 Me. 299. Citing Dorin v. Dorin; Eng. & Ir. Ap. Cas. 568, Hill v. Crook, L. R. 6 H. L. Cas. 268; Gardner v. Heyer, 2 Paige Ch. 10, 13. Cromer v. Pinkney, 3 Paige Ch. 461, 475. Collins v. Hoxie, 9 Paige, Ch. 81, 88; Hare v. Lloyd, 1 T. & R. 693; Cartwright v. Vaudry, 5 Ves. 534, 2 Jarm. Wills, Ch. 31; 1 Greenl. Ev. section 278. See Chap. XI, § 181. See also §417.

[2] See Masonic Ins. Co. v. Miller, 13 Bush (Ky.) 489; Washington Endow. Ass'n v. Wood, 4 Mackey D. C. 19; McDermott v. Life Association, 24 Mo. App. 73.

plaintiff or the defendant is entitled to the money so paid into court. There was no new designation of a beneficiary after the certificate was issued, or after the death of the first wife. That which we have quoted at the foot of the certificate, was the designation made at that time. It was "Mrs. H. M. Case, or lawful heirs," meaning Mrs. H. M. Case, or in case she was unable to take by reason of death or other disability, his lafwul heirs should become the beneficiary. It is now contended that Mrs. H. M. Case was the name of the defendant, his widow, and that, consequently, she is the beneficiary named in the certificate. We cannot assume that he then contemplated the death of his wife, and his subsequent marriage to the defendant in this action. If Amelia M. Case was the person intended by the designation upon the certificate, then, on her death, the designation lapsed as to her, and his lawful heir, which was Inez H. Case, became the person designated as the beneficiary, and, inasmuch as there has been no subsequent designation of any other person, it follows that she is entitled to the money. It is urged that, because the words "Mrs. H. M. Case" were used, it was intended that the certificate should mean one person at one time, and another at another time; that it meant Amelia M. at the time it was issued, but that it meant the defendant at the time of his death. Such, however, does not appear to us to have been the meaning of the instrument." [3]

By the provisions of a by-law of a mutual benefit society, at the death of a member the sum of twenty-five dollars was to be paid to his widow or relatives, to provide for his decent interment. The widow of a deceased member, who at the time of his death, and for years previously, had not been living with him, and had incurred no expense towards his interment, brought an action to recover this stipulated sum, and was met by an offer of the society to show that the amount had already been paid to decedent's son-in-law, at whose house he died, and who bore all the expenses of his funeral.

The court held that the offer should have been received, and that being separated from her husband, in pursuance of a mutual understanding, and not by reason of coersion or ill-treatment, living apart from him at the time of his death, and having borne no part of the funeral expenses, the widow was not entitled to the bounty of the society.[2]

[1] Day, Guardian v. Case, 43 Hun (N. Y.) 179.

[2] Berlin Beneficial Society v. March, 82 Pa. St. 166.

§ 241. Adultery of wife or widow does not effect right to fund. Where a certificate is made payable to the widow of a deceased member, she does not forfeit her right to the benefit fund by living in adultery with a strange man. The analogy of a statute respecting the forfeiture of dower for the misconduct of the wife, cannot be applied to a case of this nature.

The widow is entitled to the fund by contract, not by reason of the relation of husband and wife.[1]

§ 242. Benefit fund payable to wife "for the benefit of herself and the children of said member." A certificate of membership in a mutual benefit society, the purpose of which is to pay death benefits to the widows and orphans of deceased members, and to other persons shown to be dependent on members, was made payable to the member's widow "for the benefit of herself and the children of said member."

When the certificate was issued, the member had two children by a former wife; and at his death he left them, and a child by his second wife who also survived him. At his death his eldest child had been married, and had lived at her own home for four years. Upon these facts, the court says:

"In the first place it is plain that (the widow) is not entitled to hold this money absolutely. Even under similar language in a will, the children would have a right which they could enforce in a court of equity.[2] There is nothing to show that it was intended that the sums to be devoted to the benefit of the children should be, in the first instance, determined by her in her discretion, subject to accountability. There are no words saying that it shall be at her disposal for their benefit, or that she is to maintain or support them. In the purposes of the (society), children are placed on an equality with widows. There is nothing showing any intention to have a permanent or continued trust. The words of the certificate are simple. She is to take the money 'for the benefit of herself and the children.' In many of the cases under wills, there was something to show some discretion reposed in the primary donee, or some duty to support,

[1] Shamrock Benevolent Society v. Drum, 1 Mo. App. 320.

[2] Procter v. Procter, 141 Mass. 165; 6 N. E. Rep. 849; Loring v. Loring, 100 Mass. 340; Raikes v. Ward, 1 Hare 445; *In re* Harris, 7 Exch. 344.

or some power of disposal; but here there is nothing of the kind. Several of the cases under wills tend strongly to show that under language like this the widow and the children would be entitled to share equally.[1]

In the present case, in view of the circumstances, and of the bold language used in the certificate, we cannot go behind the plain words, and are of opinion that (the widow) and three children are each entitled to one-fourth part of the money. The circumstance that (one of the daughters) was married, and had left her father's house, does not cut her off. It would not necessarily do so under a devise. Under this certificate, her rights do not at all depend upon the question whether she was forisfamilated or not."[2]

§ **243. "Wife and children," etc.** A policy was taken out by B, "for the use of his wife Sarah and children," and the policy further provided that in case *Sarah*, the wife, should die before her husband, the amount of the insurance should be payable to "their children." The wife died leaving her husband and a child surviving; B, the assured, married again, and of this subsequent marriage, one child was born; it was held that the child of the assured, by his wife Sarah, was entitled to the whole insurance.[3]

A member of a society took out a policy of insurance providing that the proceeds should "be paid to his wife, Maglien Koehler, and children." The member had children by a former wife; and one child by his wife Maglien, and she had one child by a former husband. The question arose as to which of all these children were entitled to participate in the benefits of the policy.

The Supreme Court of Iowa said: "If we were to construe these words as meaning Maglien Koehler and *her* children, it would include not only her child by her second marriage, but it would also include her child by her first marriage. Such a construction cannot, we think, be the true one. It is not to be supposed that the deceased intended at that time to make (her child by her first marriage) the object of his bounty to the exclusion of his own children. The word "their" cannot be held to be the proper one to designate the children, because it

[1] Procter v. Procter, *supra*; Loring v. Loring, *supra;* Jubber v. Jubber, 9 Sim. 503; Jones v. Foote, 137 Mass 543.

[2] Jackman v. Nelson, Mass; 17 N. E. Rep. 529.

[3] Lockwood v. Bishop, 51 How. Pr. 221.

is an improper form of expression. In order to sustain the interpretation of the circuit court, it is necessary to make the instrument read as follows: 'to his wife Maglien Koehler and her children by him.' We do not think this is the plain and natural construction of the language. We think it should be to his wife and his children. This, it appears to us, is not only the plain and obvious construction, but it accords with the grammatical sense of the words. If the words were 'his wife and children' there would be no doubt that the meaning would be his wife and his children. The name of the wife Maglien Koehler, is thrown in as descriptive of the person and not as designating whose children are intended."[1]

§ 244. "Wife and children" continued. A certificate of membership in a mutual benefit society provided, if certain conditions were observed and performed, for the payment of the sum of $5,000.00 on the death of the member, "to be paid as a benefit to his wife, L. H. and children equally." The member, at his death, left his wife and five children, one of whom died after suit brought on the certificate in the name of all, leaving his mother and four brothers and sisters as his only heirs. The cause proceeded to judgment in the names of the widow and remaining children, who recovered judgment for the full $5,000.00. The Supreme Court of Illinois held that the widow and remaining four children were entitled to the same sum as though she and all the children were suing, and that the judgment was not for too much. The court says: "It is insisted it was error of law to render judgment in favor of the widow and the four surviving children, for the reason, the benefit secured was to be paid to the widow and the children, equally, of whom the proof shows there were five when the suit was brought. The objection seems to be, it was not proper to render judgment for full value of the benefit on a declaration in favor of the widow and four children, with the name of the deceased child omitted. It is not perceived there was any error in so rendering the judgment. There are two views, both of which sustain the action of the trial court: First, the benefit was, by the certificate, secured to be paid to the widow, (by name) and children—that is to Laura Hoffman, and to a class of persons designated as children, and to be ascertained after the death

[1] Koehler v. Centennial Mutual, etc., 66 Iowa 325; see also to same point McDermott v. Life Association, 24 Mo. App. 73.

of the holder of the certificate. At the trial it was found, from the proof, there were but four children surviving. They then constituted all the class embraced in the term 'children' and it was entirely correct to render judgment in their favor, as was done. Second, were this not so, the judgment might be sustained for another reason. It is provided by the certificate, that, in the event of the prior death of the beneficiaries named, the benefit should be paid to the legal heirs or devisees of the holder of the certificate. A correct reading of this provision would be; in case of the prior death of any one of the class designated to take the benefit, the heirs of the holder would take the share of the deceased party. Here, the plaintiffs were the heirs of the holder, and they took the whole benefit, and the judgment in their favor was regular, and authorized by law."[1]

§ **245. "Child."** In the construction of the designation of beneficiaries, the word "child" is not confined to persons under the age of majority, and where a certificate of insurance is payable to the children of a deceased member, his sons and daughters take the fund in equal proportions, without regard to their ages, or their dependence upon the deceased for support.

This rule may, of course, be modified by the provisions of the contract of insurance. It is a part of the general plan of mutual benefit insurance to enable a member to assist his family, whether or not its members are of lawful age or dependent upon him, but, when consistent with its organic law, it is proper for a society to limit its benefits to minor children, and to those who are dependent upon the members for support.

Where there is no such limitation in the laws of the society, and in the absence of an expression by the member in his certificate, of a purpose to limit the benefit to a particular class of his children, it must be held, on the plainest principles, that the member intended to extend it to all his children.

It would be so held in the interpretation of a will; and a certificate of insurance, being a post-mortem provision for the persons endeared to the member, is to be interpreted upon similar principles.[2]

[1] Covenant Mutual Benefit Association v. Hoffman, 110 Ill. 603.

[2] McDermott v. Life Association 24 Mo. App. 73; Felix v. Grand Lodge, 31 Kan. 81.

§ **245a. Child. Grandchild.** It may be laid down as a general rule that the word "child" does not embrace a grandchild. [1]

But to this rule there are two classes of cases which form exceptions: First, where the will or writing would otherwise be inoperative, or the manifest intention would be defeated; second, when the will or writing shows, by other words, that the word was not used in its ordinary and proper sense, but in a more extended sense.

In Duvall v. Goodson, 79 Ky. 224, the charter of the Kentucky Masonic Ins. Co., providing that, if the member "should leave no widow or child, then (the fund) to be appropriated according to his will, or if he makes no will and leaves no widow or child, it shall vest and remain in the company" etc., was the subject of construction, and the court held that where a member died leaving no widow or children, but leaving a grandchild, the word "child," in the charter embraced grandchild, as to hold otherwise would defeat the manifest intention of the members of the company.[2]

In Continental Life etc. v. Palmer, 42 Conn. 60; 5 Life & Acc. Cases, 37, the policy was payable to the wife, if she survived her husband; if not, to their children. The husband survived the wife, and one of the children died during the life of the father, leaving issue. It was held that the issue took the interest to which his father would have been entitled, if he had survived the insured.

Where a life insurance policy was issued upon the life of the husband, for the use of his wife, and, if she died before him, the amount of insurance was payable "to her children for their use, or to their guardian if under age," and the wife died before her husband; it was held that a grandchild of the insured, the issue of one of the children who had died before his mother, was entitled to a share under the policy.[3]

The court says: "By the policy in question an irrevocable trust was created in behalf of Mrs. Hull and her children. The same principles should be applied in its construction which govern testamentary disposition of property. The intention is clear that in the event of Mrs. Hull's death before the falling in of the policy, it was to enure to the benefit of her children generally. There is no limitation to class or con-

[1] Churchill v. Churchill, 2 Met. 469; Hughes v. Hughes, 12 B. Mon. 121.

[2] See Robinson v. Duvall, 79 Ky. 83.

[3] Hull v. Hull, 62 How. Pr. 100.

dition, nor to living or surviving children. Evidently this phraseology was intended to include the children of a deceased child."[1]

The by-laws of a mutual benefit society provided that, on the death of a member, a sum of money should be paid "to the widow of such member, if there be one; if he leaves no widow, then to the child or children, or to their lawful guardian for them, share and share alike. Should the deceased member leave no widow, child or children, the money shall be paid to such person as he may have designated in writing."

In construing the meaning of the words "child or children," the Supreme Court of Rhode Island held that they must be taken in their primary meaning, and could not be extended to include grandchildren.[2]

§ 246. Children born after issuing of certificate of membership. A widower having four children applied to a mutual benefit society for membership, and in his application directed that, in case of his death, all benefits should be paid to his four children, whose names were therein given. He afterward married and died, leaving one child by his last wife. The certificate that issued to him was made payable, at his death, "to his children." The object of the society was to establish a benevolent relief fund to protect families of deceased members, and to assist them in distress, and, by the terms of its constitution, the benefit fund, on the death of a member, was payable "to his family or his heirs." The Supreme Court of Texas held:

(1) The 'right to take under the certificate must be determined by its language, and not from the terms used in the application for membership.

(2) The certificate, which on its face inured to the benefit of his *heirs*, extended the scope of the benefit, and by accepting it the member must be held to have approved its terms.

(3) The object of the society being benevolent, its consent that the benefit should exclude an infant born after membership, cannot result from construction, but must appear in some clear and explicit way.

(4) The child born after the issuance of the benefit certi-

[1] But see Palmer v. Horn, 84 N. Y. 576; Magaw v. Field, 48 N. Y. 668; Sherman v. Sherman, 3 Barb. (N.Y.) 387, in which cases it was held that the children, under the provisions of wills, took as classes.

[2] Winsor v. Odd Fellows etc., 13 R. I. 149.

ficate was entitled to share in the benefit, equally with each of the four children named in the application.

In construing the contract of insurance, the court says:

"The case presented would be that of an application for a certificate for the benefit of certain named parties, and the issuance of a certificate for the benefit, not only of these, but of other beneficiaries also. What would be the effect of such a transaction? The applicant would not be bound to accept it, but if he did, the beneficiaries would be those designated in the certificate, and not those named in the application. It would be a case where a proposition for a contract was made by one party to another, which was accepted in a materially modified form. The party proposing would not be bound to accede to the altered contract, but if he did, it would be binding upon him, according to its modified terms. Thomas did accept a certificate different from that for which he applied, and it would seem that the effect of the contract was to entitle all of his children to participate in the relief fund upon his death, and not those only who were alive at the time the certificate was issued. But the appellee contends that we must construe the application as explanatory of the certificate, and must modify the legal sense of the word 'children,' so as to make the application and the certificate harmonize with each other; that Thomas having applied for a certificate for the benefit of all his children then in existence, and the society having issued him a certificate for the benefit of 'his children,' we must conclude that the certificate was intended to accord with the application, and this would exclude any child born to the applicant in the future. There would be some force in this suggestion, if we are to look to the application and the certificate as alone constituting the contract between the parties. But in all cases of contracts formed by reason of obtaining membership in a mutual aid society, its constitution and by-laws enter into the contract, and it must be read in the light afforded by these in order to arrive at a true construction of his terms.

Article 2, Section 3, of the constitution of the society, states that one of its objects is 'to establish a benevolent and relief fund for the protection of the families of deceased members, and to assist them in distress and in sickness.'

Article 3, Section 2, makes the benefit money payable on the death of a member to 'his family or his heirs.' By-law number seven is to the same effect. These and other pro-

visions of these instruments, show conclusively that one of the main objects of the society is to confer its benefits upon the entire family of a member, and not to restrict them to a portion, to the exclusion of the remainder. * * * * It may be that a member, with the express consent of the society, could direct his benefit money to be paid to a portion of his family, to the exclusion of the remainder, but the consent of the society would have to appear in some clear and unmistakable way. It would not appear from doubtful words, much less from those whose legal construction would evidence a dissent from the member's request, and issuance of a certificate more in accord with the spirit and intention of the constitution and by laws of the society. * * * * We think the certificate on its face includes after born children, and that it is more in consonance with the spirit and intention of the constitution of the society to so construe it, than to exclude from its benefits the after born children of the applicant."[1]

§ 247. "Heirs," "legal heirs," etc. The word "heirs" is frequently used in the statutes providing for the organization of mutual benefit societies, and in the certificates of insurance issued by such societies, to indicate a class of persons who may, or the persons who shall receive the benefit fund, on the death of the member. It often becomes necessary, therefore, to determine who are the heirs of the deceased member.

At common law one's heirs are the persons who would inherit his real estate by right of blood. The statutes of adoption and those of descent have, in every state, to a greater or less degree, enlarged the meaning of the word, so that it may include persons not of the blood of the intestate.

At common law the word had no reference to the distribution of any personalty, and this rule has not been disturbed by statute in some states. In those states, therefore, where this common law rule obtains, the word "heirs" in a statute setting forth a class of persons who may take the fund, or in a certificate designating the persons who shall take the fund, on the member's death, must be taken to mean the person or persons to whom the real estate of the member will pass, under the statutes of descent, whether such person or persons be akin to him, or not.

In most states, however, the statutes provide not only who

[1] Thomas v. Leake, 67 Texas, 469; 3 S. W. Rep., 703; See Ricker v. Charter Oak, etc., 27 Minn., 193.

shall inherit the realty of an intestate, but also who shall be the heirs of his personal property.

When the same persons are the heirs of both the real and the personal property, the question as to who are the heirs, and, hence, the beneficiaries, is in no way complicated by the statutary provisions.

§ **248. "Heirs" continued.** But where, under the same facts, the personal property descends to other persons than those who inherit the real estate,—where the heirs of the personal property are not the same persons who are the heirs of the real estate, the first question to be determined is, who are to be taken as the beneficiaries, the heirs of the personalty, or the heirs of the realty?

In the case of Alexander *et al.* v. Northwestern Masonic Aid Association *et al.*,[1] the facts were that a member died holding certificates of membership in a society for $8,500 payable to his heirs. He died, leaving a wife, but no children. He also left a father, mother, three brothers and a sister.

The charter of the society recited that it was formed to secure pecuniary aid to the "widows, orphans, *heirs*," etc., of deceased members.

Section 1 of chapter 39 of Statutes of Illinois provides as follows:

"*Second*:—Where there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, then (the estates, both real and personal, of intestates shall descend) to the parents, brothers and sisters of the deceased and their descendants," etc.[2]

"*Third*. When there is a widow or surviving husband, and no child or children, or descendants of a child or children of the intestate, then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute estate forever, and the other half of the real estate shall descend as in other cases, where there is no child or children, or descendants of a child or children."

The Supreme Court of Illinois has decided that, under clause third just quoted, the widow takes as the heir of the husband.[2]

[1] In the Supreme Court of Cook County and in the Appellate Court of Ill., First District, not yet reported, but appealed to the Supreme Court.

[2] Sutherland v. Sutherland, 69 Ill. 481; Rawson v. Rawson, 52 Ill. 62.

The question for decision was, who are the heirs of the decedent, and the beneficiaries of the certificates?

The Superior and Appellate Courts hold that the "widow is the sole heir at law to the personal property of the deceased, and the other heirs at law, the father, mother, brothers, etc., have no right title or interest in said fund, or any part thereof."

There is no discussion of principles in the opinion, nor are any reasons given for the decision.

It is manifest, however, that, in such a case as the one under consideration, it is necessary to hold either that the heirs of the real estate are the beneficiaries, that the heirs of the personal estate are the beneficiaries, or that the heirs of the real and personal estate are entitled to the fund. Of course the fund was no part of the estate of the intestate, but if it had been, it would have been a part of his personal estate. The fund is personal property. Nothing is more natural, therefore, than to regard the heirs of the intestates' personal property as the beneficiaries designated in the contract of insurance as "my heirs." In this connection, reference may also be made to the well settled principle that the word "heirs" is flexible, and that, in the construction of wills, in the case of personalty, it is taken to mean next of kin.[1]

§ **249. "Heirs" continued.** By the statutes of descent of Tennessee, the real estate of an intestate owner is inherited "by all the sons and daughters of the deceased, to be divided amongst them equally." By the statutes of distribution, the personal property of an intestate owner is to be distributed "to the widow and children, or descendants of children representing them, equally, the widow taking a child's share."

A member of a society died leaving surviving him a widow, three children and two grandchildren, the children of a son who died before him. He also left a certificate of insurance payable to his "legal heirs." In certain litigation which arose concerning the benefit fund, it became necessary for the Supreme Court of Tennessee to decide who were the beneficiaries named in the certificate, and that court held that the widow, children and grandchildren, the distributees of the

[1] Vaux v. Henderson, 2 Jac. & Walker's Chancery Rept. 388; Ward v. Saunders, 3 Sneed (Tenn.) 387; Hodge's Appeal, 8 Weekly Notes of Cases, 209; see §258.

personal estate of the intestate, under the statutes of distribution, were the beneficiaries, and were entitled to the fund.[1]

§ 250. **"Heirs" continued.** Where the statutes of a state provide different courses of descent for ancestral and non-ancestral property, every reason and analogy point to the proposition that a benefit fund derived by contract from a mutual benefit society shall go to those persons who are the heirs of the non-ancestral property of the decedent.[2]

§ 251. **Heirs continued.** It is evident that the statutes of the different states must determine the question as to who are the heirs of an intestate, and that the persons who will take the fund under a designation of "my heirs" in one state, may have no interest in the fund under the laws of some other state. Thus, in Indiana, a certificate payable to the "legal heirs" of a member, when he leaves a widow and children at his death, is payable to all of them. His widow, in such case, is included in the word "heirs."[3] In Illinois, in such case, she is not included among the beneficiaries.[4]

§ 252. **"Heirs" continued.** The words "my legal heirs," "my heirs at law," "my heirs," etc., as used in wills, have frequently been the subject of judicial construction. The meaning of these words, when taken alone, is usually plain enough, but the contention always is that, from the context, it is evident that they were used in some other than the ordinary sense. In a will, the testator usually makes provision for several persons, and, in several clauses of the instrument, gives and bequeaths his property. In such cases, the context often controls the meaning of words used. But in mutual benefit insurance, such words and phrases are used only in

[1] Gosling, Guardian, v. Caldwell, 69 Tenn. (1 Lea.) 454.

[2] Jamieson v. Knight Templar and Masonic Mutual Aid Association, 12 Cin. Law Bull. 272.

[3] Wilburn v. Wilburn, 83 Ind. 55.

[4] Gauch v. Ins. Co, 88 Ill. 251; But in The Covenant Mutual Benefit Association v. Hoffman *et al.* 110 Ill. 603, it was provided by the certificate that, in the event of the prior death of the beneficiaries named, the benefit should be paid to the legal heirs or divisees of the holder of the certificate. The court says: "A correct reading of this provision would be, in case of the prior death of any one of the class designated to take the benefit, the heirs of the holder would take the share of the deceased party. Here the plaintiffs (the widow and four children) were the heirs of the holder, and they took the whole benefit, and the judgment in their favor was regular, and authorized by law."

answer to such questions as, "To whom shall the benefit fund be paid?" "Whom do you designate as your beneficiaries?" etc. The answer is usually short, and to the point; "my heirs," "my legal heirs," etc. The other provisions of the contract relate to matters entirely apart from the disposition of the fund. When we come, therefore, to place a construction upon this designation of the beneficiary, we are seldom met with other provisions of the certificate upon the same subject, from which the theory may be drawn, that the member intended to use the words in a different sense than the ordinary one. Ordinarily there is no ambiguity in the contract, and recourse must be had to the statutes alone to find out who are the legal heirs of the intestate.

The interpretation given by the courts to such terms and words, when used in wills and controlled by other words, will, now and then, be of the first importance in determining the proper construction to be given to the designation of beneficiaries made by a member of a mutual benefit society. But so many of these decisons have direct application to the statutes of the states in which they are rendered, that no attempt will be made to review them here.

§ **253. "Heirs" continued.** The designation of the beneficiary, as set forth in the certificate, must be construed with reference to the law under which the society is organized, the charter, the constitution and the by-laws. The provisions of these form the context which may control the meaning of the designation. From this fact, it is evident that it is often necessary to do more than to resort to the statutes of the state to determine who, under their provisions, are the legal heirs. It is not always, by any means, a plain question of statutory provision, but, on the contrary, it is often a matter involving a nicety of distinction, and a careful consideration of the whole contract of insurance, in connection with the statutes, to declare who are the beneficiaries of the contract, under the designation of "my heirs" etc. Some instructive cases illustrating this fact are reviewed further along in this chapter.

The word "heirs" has a technical signification, and where there is nothing in the context to show that it was used in any other sense, it will be presumed that, in the certificate, the term "legal heirs," "heirs at law," or "my heirs," was used in its strict and primary sense. In certain contingencies, brothers, sisters, parents, and even remote kindred are heirs at law, but it would be absurd in the extreme to suppose that a

member of a mutual benefit society, who has designated his "legal heirs" as his beneficiaries, intended that all his kindred should take. The legal presumption, in such case, would clearly be, that he intended those to whom the law would give his property—he dying intestate; and, hence, it is the actual capacity of inheritance, at the time of the death of the owner of the property, and not the fact that a particular person might have inherited from him, under a state of facts which did not exist, that determines who is an heir of a decedent.[1]

§ **254. "Heirs" continued.** When, under the law of a state, the widow is an heir of her deceased husband, and, under the facts of a case, is his sole heir at law, it is immaterial, as showing the intention of the deceased member, that he made his certificate payable to his "heirs," and not to his "heir" at law. By the use of the word "heirs" the member meant what he said—that whoever might prove to be his heirs, and *nemo est haeres viventis*, should have the benefit fund. His heirs might be one or more persons. His widow might, and might not, be one of them.[2]

§ **255. "Heirs" continued.** By the charter of a mutual benefit society, the persons whom the insured could designate as beneficiaries were limited to his widow, his orphan children and other persons dependent upon him, and the by-laws of the association provided that, if the assured made no designation, the amount should be paid to his widow, or, if he left no widow, to the guardian or trustee of his minor children. The insured, at the time of making his designation, had a wife and two daughters, and, in his application for membership, in answer to the question, "To whom will you have your death loss paid?", answered, "To my heirs," and, in reply to a request to state the relationship of any of the persons to whom payable, answered, "Wife or daughters." The wife survived the insured. Upon these facts the Supreme Court of Massachusetts held that "the meaning is sufficiently plain that he intended that the payment should be to his widow, or, if he left no widow, to his surviving daughters. * * The intention that the money should be divided between the widow and surviving children is not in accordance with the purpose

[1] Gauch v. St. Louis Mutual Life, etc., 88 Ill. 251; Elsey v. Odd Fellows Ass'n, 7 N. E. Rep. 844.

[2] Jamieson v. Knight Templar etc. Association, 12 Cin. Law Bull. 272.

of the association. * * If there was any designation, it was to the widow, or if there should be no widow, to the surviving daughters. If there was no valid designation, the widow is entitled to the money. It is, therefore, unnecessary to consider the several objections presented to the sufficiency or validity of the designation. In any aspect of the case, the money is to be paid to the widow."[1]

In Kentucky Masonic, etc., v. Miller's Administrator, 13 Bush. (Ky.) 489, the charter of the society provided that the benefit fund should be paid to the widow and children of the deceased member, according as the will of said deceased member should direct, or, if he should leave no widow or child, then to be appropriated according to his will, etc. A member took out a certificate payable to his "heirs, or as he may direct in his will." He died intestate leaving a widow and no children, and his widow and not his administrator, was held to be entitled to the funds. The court says: "The charter prescribes who may become members of the company, and their obligations, and who shall be beneficiaries of the membership after the death of the member, and it is not in the power of the company, or of the member, or of both, to alter the rights of those who, by the charter, are declared to be beneficiaries, except in the mode and to the extent therein indicated."

§ 256. "Heirs" continued. The words "heirs" and "next of kin" may be so used in association with other language, and under such circumstances, as to show an intention to include others than blood relations.

A member of a mutual benefit society had no near relative by blood, except a brother, of whom his wife knew nothing, and who was living in Europe. The member was on the most cordial terms with his wife, whom he had married more than twelve years before, and by whom he had one child and, afterward had another. He was a foreigner, and presumably not well acquainted with the English language. He was illiterate, for in his application for insurance he designated as his beneficiaries "my *leagal heiros.*" He afterward made a will, giving all his personal estate to his "beloved wife," but left little provision for her when he died, except such as the certificate might afford her. He left no children, father, mother, brother

[1] Addison v. New England Commercial Traveler's Ass'n. Mass. 12 N. E. Rep. 407.

or sister surviving him, except the brother who claimed the fund under the term "my *leagal heiros*."

The court says: "All this is entirely inconsistent with the theory that he used the phrase "legal heirs" in its ordinary acceptation; but he intended thereby to designate his wife and children, if he should leave any; and this is the meaning often attached to the phrase by the unlearned, especially when only personal property is concerned.[1]

§ 257. In what proportion heirs take the fund.

When gifts by will to heirs-at-law are made to them *simpliciter*, the persons to take, and the proportion which they shall take, must be determined by the statute of descent and distribution. The will, in such a case, not only designates who are to take, but also the *quantum* of the estate taken.[2]

For the purpose of ascertaining the persons who are the beneficiaries under a designation of "my heirs," etc., it is necessary to consult the statutes of the state, casting the descent of the property of an intestate. But from this it does not follow that the statute determines the proportion of the fund which each heir shall take. When a member has made his certficate payable to his "heirs," they do not take the fund by descent, but by contract. The statutes of descent and distribution cease to be of use, therefore, at the very moment when the heirs at law of the intestate have been found according to their provisions. They point out the persons whom the contract declares shall be the beneficiaries, but they do not determine the rights of such persons under the contract. The rights of the beneficiaries, in a certificate taken out by a member, are such as the contract confers, and are not rights arising by operation of statutory rules. The contract, and not the statute, fixes their rights, and they have such rights only as the contract of insurance vests in them. We are, therefore, to look to the terms of the agreement, and not to the provisions of the statute, to ascertain the rights of the parties.[3]

Where a member of a society makes his certificate payable to his legal heirs, and dies, leaving a widow and children, the widow, where she is the heir of her husband, and entitled to

[1] Kaiser v. Kaiser, 24 N. Y. Weekly Dig. 410; 13 Daly 522.

[2] Rawson v. Rawson, 52 Ill, 62; Richards v. Miller, 62 Ill., 417; Baskin's Appeal, 3 Pa. St., 304.

[3] Wilburn v. Wilburn *et al.*, 83 Ind, 55.

a larger part of his estate than any one of his children, is not the superior, or the inferior of her joint beneficiaries, but their equal. This is in harmony with the general principle that when a benefit is granted to several, and their respective proportions are not specified, the beneficiaries take equally.[1]

In Gosling v. Caldwell, 69 Tenn. (1 Lea) 454, the contrary doctrine was held to be the law. A member of a society died leaving a widow, three children and two grandchildren, the children of a son who died before him. His certificate was payable to his "legal heirs." The court held that the widow, the three children and the two grandchildren were entitled to the fund, and that "the chancellor's decree, giving one fifth of the fund to the grandchildren, must be affirmed." Nothing further is said in the opinion, as to the *quantum* which each beneficiary shall take, under such a designation, than the language above quoted.[2]

§ 258. Legal Representatives. The words "legal representatives" in a contract of insurance, designating the beneficiaries, when there is nothing in the context or surrounding circumstances to indicate a contrary intention, mean "executors or administrators."

A certificate of membership payable to the legal representatives of the insured member, is the same as if made payable to himself. But where the charter of a society provides that certain persons only may be beneficiaries, as for instance, the widow, orphans, and heirs of deceased members, the term "legal representatives," as designating beneficiaries, will be construed with reference to the charter, as meaning those who are the legal representatives of the member in contemplation of the charter.[3]

[1] Wilburn v. Wilburn *et al.*, 83 Ind., 55; Crocket v. Crocket, 2 Philips, 553; Allen v. Hoyt, 5 Met., 324. See § 265.

[2] A statute of Tennessee provides that where a husband takes out a policy of insurance on his life, it shall, on his death, accrue to the benefit of his widow and heirs, to be divided between them according to the law of distribution, free from the claims of creditors. Whether that statute has any application to this case, where the policy is payable to the "legal heirs" of the insured, or whether it is applicable only in cases where the policy is payable to the estate of the insured, to his legal representatives, or to himself, is not stated in the opinion, but the case seems to have been decided without reference to this statute, both upon this point and the further point reviewed in § 249, viz., that those who take the personalty of an intestate, and not those who inherit his realty, are the beneficiaries, under a designation of his "legal heirs," in a certificate of insurance.

[3] Relief Association v. McAuley, 2 Mackey D. C. 70.

A certificate made payable to the wife and children of the member, or their "legal representatives," was held to be for the benefit of the only child of the last survivor of the children of the insured, the wife and other children having died without issue. The court says: "Here (the certificate) is payable to the children or 'their representatives.' This expression shows that the possibility of the death of some or all of the children during the life of the insured was not overlooked, and that such an event was intended to be provided for. And when we consider the nature and design of life insurance, and the relation of the parties, we think the policy should be construed as if it were payable to such of the children as should survive the insured, and the surviving issue of such as might die during his life." [1]

Where, by an article of the by-laws of a society, it is provided that the benefit fund may be disposed of in a certain manner by the member, but, if not so disposed of, it shall go to the heirs and legal representatives of such member, by the words "heirs and legal representatives," as applied to personal property, is evidently meant next of him, as ascertained by the intestate laws.[2]

§ 259. Meaning of the word "orphans" as used by societies. The word "orphans" is frequently used in the laws providing for the organization of mutual benefit societies, and in the contracts of insurance issued by them. It is not so used in a technical sense, as meaning minors or infants who have lost both of their parents. It may be stated that, from the various provisions of the charter, by-laws and certificates, it will appear that the word "orphans," as used by a society, means children of a deceased member, whether their mother is living or not, and whether they are over or under the age of majority.

The charter of the Royal Arcanum society declares one of its objects to be to assist "the widows and orphans of deceased members," and to establish "a widows' and orphans' benefit fund." The constitution provides that from this fund a sum of money shall be paid to a member's family, or those dependent on him, as he may direct. A certificate was issued to a member, payable to his wife "for the benefit of herself and

[1] Robinson v. Duvall, 79 Ky. 83; see Benefit Association v. Hoffman, 110 Ill. 603.

[2] Hodges' Appeal, 8 Weekly Notes of Cases (Pennsylvania) 209; Eisey v. Odd Fellows' Mutual; Mass. 7 N. E. Rep. 844.

the children of said member." It was held that, under these provisions, the benefit fund was payable equally to his widow, his child by her, and his two children by a previous wife, one of whom was twenty-three years of age,—all the children being orphans within the meaning of the charter.[1]

§ 260. **When the member becomes a beneficiary by inheritance.** A benefit certificate is often made payable to the wife and children of the member. As any one, or all of such designated beneficiaries may die before the member, it becomes important to determine whether the member himself becomes a beneficiary by inheritance from any beneficiary so dying. Generally speaking, it may be said that he does not. Under the general plan of mutual benefit insurance, the beneficiary has no vested right in the benefit fund, and the persons who may be beneficiaries are limited so as to exclude the member and his estate from taking the fund. But these features of this general plan are changed in some societies; and if the beneficiary so dying had a vested right in the fund, and if the estate of the member may, under the contract, take the fund, then the case does not differ from ordinary life insurance, and, according to the weight of authority, the member becomes a beneficiary under the contract, where he is the heir of the beneficiary so dying.

A mutual benefit society issued to A. a certificate of membership which entitled "his wife, her heirs or assigns, upon the death of said A. to $3,000.00." The wife died intestate during A's. lifetime leaving children, and afterward A. died. As A. survived his wife, he, or his estate was entitled to a share as her heir.

The Supreme Court of Pennsylvania says: "The fact that this association has some features to distinguish it from a life insurance company does not establish any error in this judgment. The husband inherited from his wife.[2]

[1] Jackman v. Nelson, Mass.; 17 N. E. Rep. 529.

[2] Mutual Aid Society v. Miller, 107 Pa. St. 162; See Anderson's Appeal, 85 Pa. St. 202; Deginther's Appeal, 83 Pa. St. 337, where policies were payable to the wife of the insured "her executors, administrators and assigns," and the husband was held to take as her heir upon her death prior to his; Hutson v. Merrifield, 51 Ind. 24; Glanz v. Gloeckler 10 Ill. App. 484; affirmed 104 Ill. 573; Endie v. Slemmons, 26 N. Y. 9; Knickerbocker Life etc. v. Weitz, 99 Mass. 157; North American Life etc. v. Wilson, 111 Mass. 542; Continental Life v. Palmer, 42 Conn. 60.

§ 261. Same subject continued. It is held in some courts that a certificate of membership, as between the member and the society, is strictly and only a contract for the payment of money upon the happening of a contingency, uncertain only as to the time when it will occur, and is subject to the general rules which govern in the interpretation of contracts. But when considered with respect to the rights of those who claim to be beneficiaries, especially when they are the natural objects of the affection and bounty of the person procuring and paying for the insurance, it should be regarded in the light of a testamentary provision rather than of a contract, and should be interpreted on similar principles.[1]

A man took out a policy of insurance on his life, payable to his wife and children, or their legal representatives. At the date of the policy the insured had three children, all minors and unmarried. In a few days thereafter his wife died. He died on April 7, 1878, having survived all his children. Two of the children died in infancy and unmarried; and one, having married, left an only child and her husband surviving her. Before his death, and after the death of all his children, the insured assigned and delivered the policy to his niece, intending it as a gift to her. The question to be decided was whether the grandson, or the niece of the insured was entitled to the benefit fund. On behalf of the niece it was contended that upon the delivery of the policy, the wife and the three children of the insured became invested, each with a one-fourth interest in it; and that, upon the death of the wife, her interest passed to her husband under the statutes of distribution; and that, at the death of the unmarried daughters, their interests passed to their father in the same way; and that at the death of the married daughter, during the life of her father, her interest lapsed as if it had been a legacy; and in this way the insured became the owner of the entire policy, and could invest his niece with a good title.

But the court said: "In taking the policy, the insured was not providing for himself, but for his wife and children after his death; and it would be unreasonable to suppose that he intended, in case one of these objects of his affection should die during his life, that the interest of the one so dying should

[1] Robinson v. Duvall, 79 Ky. 83; Duvall v. Goodson, 79 Ky. 224; Endowment Association v. Wood, 4 Mackey (D. C.) 19; McDermott v. Centennial Mutual etc., 24 Mo. App. 73.

pass to himself, and, at his death, to his personal representative. It would be more consistent with his evident design in insuring his life for the benefit of all his family—wife and children alike—to suppose that his intention was, that in case one or more should die before himself, without leaving children, the share to which those dying would have been entitled, had they survived him, should go to the survivors. He dedicated the whole to his family, share and share alike, and as the family was reduced by death, and he came to renew the policy, by paying the annual premiums, it can scarcely be doubted that he did so in order to provide for those who still survived; and this evident intention ought not to be defeated unless there are insurmountable legal obstacles in the way of effectuating it.[1]

§ **262. When estate of the beneficiary does not take the fund.** It is a general principle of mutual benefit insurance, that the beneficiary named in a certificate acquires no vested rights in the benefit fund, until the death of the member. It follows from this that when a designated beneficiary dies prior to the death of the member, the benefit fund does not, on the subsequent death of the member, go to the administrator, nor descend to the heirs of such beneficiary.

This general principle may, of course, be changed by statute, charter, by-laws, or the certificate, but there are few mutual benefit societies in which any such change has been made.

A member of a society appointed his wife as his beneficiary, but the contract of insurance did not designate to whom the fund should be paid, in case the beneficiary died before the member. The appointment did not vest in the beneficiary the absolute right to the fund. It was held, under these facts, that the appointment was revoked by the death of the beneficiary; that Rev. St. Wis. § 2347, which empowers a husband to insure his life in favor of his wife, and provides that such insurance shall inure to her separate use, and that of her children, does not apply to mutual benefit insurance.[2]

The charter of a society provided for payment of the benefit fund, in case of death, to the legal representatives of a member, and the by-laws provided for payment of the fund, in case of failure to designate a beneficiary, to the legal representatives of the deceased. A member designated his wife as his bene-

[1] Robinson v. Duvall, 79 Ky. 83; See Covenant Mutual, etc. v. Hoffman, 110 Ill. 603.

[2] Given v. Wisconsin Odd Fellows, etc., Wis. 37 N. W. Rep. 817.

ficiary. She died before he did, but he did not make a new designation. The court held that, under the charter and by-laws, if a member failed to appoint a beneficiary, or, if at the date of his death, there is no appointee named by him, alive and capable of taking, it is to go to his legal representatives, and in this case it was held that his representatives, not hers, took the fund.[1]

The object of a society, as declared by the charter, was "to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee or legatee of a deceased member." By a provision of one of the by-laws, if a deceased member had no "legal representatives," the fund should become the property of the association.

A member made the following designation of beneficiary in his application. "In the event of his death he directs that all benefits arising from his connection with the association be paid to his wife, A. R., unless he shall otherwise order and give to the secretary of the association ten days notice of his desire." His wife, A. R. dying, the member married S. A. R., and afterward died intestate without children, leaving his second wife surviving him. In construing this designation, the court held, that the language used by the member in designating his first wife as the beneficiary, must be interpreted as meaning that the first wife should take the fund in case she survived him, and, as she did not, her representatives were not entitled to it.[2]

§ **263. Same subject continued.** A beneficial association to provide "an endowment fund to be paid to the persons entitled thereto" etc., issued to one of its members, a certificate of insurance by which it agreed to pay to his wife, "or her legal representatives" a certain sum within sixty days after his death. The wife died, and thereafter, without making any change in the beneficiary, the member died. The legal representatives of the deceased wife then claimed the fund.

The Supreme Court of the District of Columbia held that this contract of insurance was a trust; that when the beneficiary died, the object of the trust failed, and there was a resulting trust to the member; that the case was analogous to a lapsed legacy, and that the words "or her legal representatives" were of no importance, inasmuch as those persons would have taken the fund in succession and by representation, if it

[1] Expressmans' Aid Society, v. Lewis, 9 Mo. App. 412.

[2] Masonic Mutual, etc. v. McAuley, 2 Mackey (D. C.) 70.

had been vested in the beneficiary, whether expressly named by the member or not; but since the beneficiary's death before the member's prevented her ever taking any interest in the bequest, it followed that her executors or administrators could take no title thereto;—that the fact that "her legal representatives" were named afterwards did not indicate that they were to take as beneficiaries successively nominated; that there was but a single designation, and that designation was to the wife alone; that the words "legal representatives," as used in the certificate, had no signification different from that which is attributable to those words generally — namely, persons appointed either by will, or by the law to administer upon the estate of a deceased person; and that the estate of the husband was entitled to the fund.

This decision, written by Justice Wylie of the court, was concurred in by Justice James, but Chief Justice Cartter wrote a dissenting opinion in which he held that the contract of insurance was to be construed as any other contract, and that the doctrine of a lapsed legacy did not apply to such contracts.

§ **264. Same subject continued.** By the constitution and by-laws of an association, members are entitled to participate in the benefit fund "with the right to hold, dispose of and fully control said benefit at all times."

A member had issued to him by the association a certificate in which he designated his wife as his beneficiary. She died, and afterward the member died without having disposed of the fund in any manner after her death. The court, in determining whether her, or his administrator took the fund, says: "With this right at all times to hold, dispose of and control, his mere designation of some person to receive the benefit would be revocable. It would not prevent his subsequently designating some other person to receive it. While, in case of his death without having revoked his appointment of his wife, she would have been entitled to receive the benefit, yet during his life, because of the power of revocation, all that she had was a mere expectancy, dependent on his will and pleasure. That expectancy was not property, not estate. The expectancy terminated when she died, and did not pass to her administrator."[1]

A certificate of membership provided for the payment of a certain sum, within thirty days after due notice and satisfactory evidence of his death, to his wife, *or the legal representatives*

[1] Richmond, Adm'r. v. Johnson, Adm'r. 28 Minn. 447; See Bickerton v. Jacques and Mutual Life, 28 Hun (N.Y.) 119.

of the insured member. The court held that the intention of the assured was that his wife should have the proceeds, in case she survived him, but, in case she did not, such proceeds were to go to his executor or administrator, to be distributed in due course of administration.[1]

§ **265. When beneficiaries take equally.** Where a benefit is granted to several persons, and their respective proportions are not specified, the beneficiaries take equally.[2]

Where a certificate of membership provides that the benefit shall, at the death of the insured, be paid to his wife and children, such benefit is payable to his wife and children equally. In such a case, the wife is neither the inferior nor the superior of her joint beneficiaries, but is their equal, and the beneficiaries take by virtue of the contract, not by descent.[3]

Where a certificate of membership is made payable to the wife and children of the member, each child is entitled to receive his proportionate share of the benefit, although one of such children may never have lived with his father as a part of his father's family, and may also have received a portion of his father's estate, prior to his father's death. The court, in thus deciding, says: "It must be supposed that this grand lodge understood the language which it used in the contract, and that it intended to make just the kind of contract which it did in fact make, and that it intended to bind itself to perform just what it agreed to perform, and did not intend to be bound by any secret arrangements, or settlements, or understandings previously entered into, or at any time existing between, any of the members of the family. We think this grand lodge is simply bound to pay in accordance with the terms of its contract; and its contract says that it shall pay the fund to the wife and children of Frederick (the member insured), which according to all well-settled rules of construction means the wife and children equally."[4]

§ **266. Same subject continued.** In Hallan v. Gardner's Adm'r., 5 Ky. Law. Rep., 857, the superior court held that, when the charter of a society appoints the widow

[1] Johnson *et al.* v. Van Epps, 110 Ill. 551; 14 Ill. App. 201.

[2] Wilburn v. Wilburn *et al.*, 83 Ind. 55; Crockett v. Crockett, 2 Philips, 553; Allen v. Hoyt, 5 Met., 324.

[3] Felix v. Grand Lodge, A. O. U. W., 31 Kan., 81; Wilburn v. Wilburn, 83 Ind., 55; Hamilton v. Pitcher, 53 Mo., 334; Cragin v. Cragin, 66 Me., 517; Gould v. Emerson, 99 Mass., 154.

[4] Felix v. Grand Lodge, A. O. U. W., 31 Kan., 81; 1 Pac. Rep. 281.

and children of the member as his beneficiaries, but does not specify in what proportions they shall take the fund under a certificate issued by it, they take equally.

But the Court of Appeals of Kentucky held otherwise in a case involving this point. Thus, the charter of the Kentucky Masonic Mutual Insurance Company provides that "the fund created for the benefit of the widow and children of a deceased member shall be paid to them," but does not declare in what proportion each shall take. In McLin v. Calvert, 78 Ky., 472, it was held that the statutory rule as to distribution of surplus of personalty of an intestate's estate should obtain in the distribution of a benefit fund derived from the company. The court says: "It is most natural and reasonable, as well as just, that when the policy and charter fail to make complete provision for the distribution of the fund, the courts should adopt the statutory rule for the distribution of the surplus personalty of estates, and divide it as they would do if the money was the proceeds of a note or bond held by the decedent. * * * * This seems to us to be not only just, but what a large part, if not all, of those who insure for the benefit of their families, would understand to be the effect of the contract made with the insurance company; and in laying down this rule, we entertain little doubt that we are doing just what the insured would have directed to be done if the question had been propounded to him."[1]

§ 266a. Survivor of two beneficiaries. Under a certificate of a mutual benefit society, naming two persons as beneficiaries, and providing that, "in case of death of either, full amount to go to the survivor, if living; if not living, to the heirs of said member," if the member dies first, the benefit fund vests in them both; and if one of the beneficiaries dies before payment of the benefit is made, his share of the fund goes to his executor, not to the survivor.[2]

§ 267. Agreement between member and beneficiary as to fund. Parol evidence is admissible to show that the designated beneficiary of a certificate promised the member that, after deducting from the benefit fund whatever sum of money might be due him from the member at the member's death, he would pay the remainder to the member's

[1] See Continental Life, etc., v. Palmer, 42 Conn., 60.

[2] Union Mutual Aid Ass'n v. Montgomery, Mich., 38 N. W. Rep. 588.

heirs. Such oral testimony is not in conflict with the written contract of insurance. It is offered, not to vary or control the contract between the deceased and the society, but to show another and an independent contract between the member and the beneficiary. It is offered, not to show that the beneficiary is not to receive the money, but to show what he is to do with it after receiving it.[1]

§ **268. "Guardian" of member.** A subdivision of an application was as follows: "Name and relationship of person to whom benefit is to be paid;" (after which was written the name of the beneficiary,) Relation; (after which was written the word "guardian." In commenting upon this designation, the city court of New York says:

"The term 'guardian' after the word 'relation' in the application has no significance in this case. The applicant was twenty-four years of age, and in sound health at the time of making the application. It was known to all that the plaintiff could not have been the guardian of the applicant in the legal, but rather in the popular sense of that term, which means 'one who guards, preserves or secures.' (Webster's Dict.) The plaintiff kept a boarding house, and the applicant boarded with her, and in this limited sense 'she guarded, preserved and secured' him. The term as used in the application means this, or nothing. The loss was payable to the plaintiff, and the action was properly brought in her individual name."[2]

§ **269. Reformation of certificate, inserting name of beneficiary.** A certificate of membership in a mutual benefit society may be reformed, after the death of the member, by inserting the name of a beneficiary, when it appears that the secretary of the association and the assured both understood at the time of the application, that the proposed name should be entered upon the record without further direction, and where it was the duty of the secretary to enter and keep a record of the beneficiaries.[3]

§ **270. Incomplete designation.** The by-laws of a society provided that the members might designate the person or persons to whom payment of the benefit fund should be made after death, but made no provision as to the manner

[1] Catland Ex'r v. Hoyt, Me., 5 Atl. Rep. 775.

[2] Carraher v. Insurance Co, 11 N. Y. St. Reporter 665.

[3] Scott v. Provident Mutual, etc. N. H.; 2 New Eng. Rep. 286.

in which such designation should be made. On the back of its certificates, however, it placed a blank form in print, with the places designated for the signature of the member holding the certificate, and for the name of a witness. The court held that the placing of this printed form in blank upon the back of the certificate, pointed out the manner in which such designation should be made, and that where the member had merely filled up the blank, in the form for designation with the names of his three daughters, and had not signed such designation, nor had a witness sign it, the designation was incomplete and invalid.[1]

§ **271. Where no designation is made.** A society was incorporated under a statute, "to aid, assist and support members or their families in case of want, sickness or death," which statute authorized it to create, manage and disburse a beneficial fund sufficient to pay all losses and expenses incident to the corporation, for the relief of members and their families, under such conditions and regulations as might be adopted by the grand lodge; and it was provided that such beneficial fund might be set apart "to be paid over to the families, heirs or legal representatives of deceased or disabled members, or to such person or persons as such deceased member may, while living, have directed; and the collecting, managing and disbursement of the same, as well as the person or persons to whom, and the manner and time in which, the same shall be paid on the death of a member, shall be regulated and controlled by the rules and by-laws of the said grand lodge." The only by-law adopted by the society relating to this subject provided that each member of the order should be entitled to a mutual aid certificate, which should set forth the name and good standing of the member, the amount of benefit to be paid at death, and to whom payable, and that such certificate should represent $2000.00.

In an action against the society for the amount of the benefit fund, on account of the death of a member, it did not appear that any certificate provided for by the by-laws, above referred to, was ever issued to the deceased member. In holding that, under these facts, there was no contract of insurance between the deceased member and the society, the court says: "The lack of such certificate, we conceive, is fatal to the plaintiff's action. The statute does not designate the benefi-

[1] Elliott v. Whedber, 94 N. C. 115.

ciary. It describes certain classes of persons who may be made beneficiaries, to wit: (the families, heirs or legal representatives, etc., as above quoted), and it directs that the amount of the fund, and the person or persons to whom it shall be paid, *shall be regulated and controlled* by the rules and by-laws of the lodge. In accordance with that direction of the statute, the defendant has "regulated and controlled" the subject by providing in its by-laws that the person to whom the fund shall be payable on the death of a member shall be the person named in the mutual aid certificate issued to such member. Thus, by the statute and the by-law, the designation in the certificate gives the sole right to the fund, and, without such designation, it is impossible to say that either, or which, of the persons or classes of persons mentioned in the fourth section of the act is entitled to the fund. Such designation is made the condition precedent of the defendant's liability. The trial court found that the intestate was not guilty of any default or neglect of duty as a member of said order in not procuring a certificate. That finding does not aid the plaintiff. There is no finding or evidence that the lack of a certificate was owing to any neglect or omission of duty on the part of the defendant. If the intestate had applied to the proper officer of the defendant to issue a certificate designating as the beneficiary a person named by the intestate, and the officer had unreasonably refused, it may be that the person so named would have had a right to recover on the death of the intestate; but that is a question not before us, and upon which we express no opinion. The respondent's counsel contends that, as there is no evidence that the intestate procured a certificate payable to any person other than his family, heirs or legal representatives, it is to be presumed, in the absence of proof to the contrary, that a certificate was issued payable as the statute provides it shall be payable. To this there are two answers. In the first place, the statute as we have seen, does not provide to whom the certificate shall be made payable, but remits that subject to the control and regulation of the corporation by its rules and by-laws. In the next place, no presumption arises that the corporation issued a certificate to anyone. It was under no duty to do so, unless the intestate requested it and designated a person to whom it should be made payable, of which there is no evidence. The charter and by-laws respecting the designation of the person to whom the beneficiary fund shall be made payable, were a part of the contract

with the defendant, which the intestate entered into when he became a member, and, as their provisions have not been complied with, the defendant is not liable. The defense does not rest, as the respondent's counsel seems to suppose, upon the objection that the present plaintiff is not the proper party, but it stands upon the ground that the defendant is not liable to anyone."[1]

§ 272. **Same subject continued.** An association, organized for "furnishing relief and assistance by means of mutual agreement and payment of funds," and "to secure to dependent and loved ones assistance and relief at the death of a member," issued to a member a certificate providing "that a sum not exceeding $2,000 will be paid by the association as a benefit, upon due notice of his death and the surrender of this certificate, to such person or persons as he may, by entry on the record book of the association, or on the face of this certificate, direct the same to be paid, provided he is in good standing when he dies." The member died in good standing without designating a beneficiary as provided, or in any other manner. Upon these facts, the court held that the fund lapsed to the society, and said: "The defendant promised to pay the benefit to no one save such person or persons as (the deceased member) should direct by entry upon the certificate or record book of the association. By the contract, he had the mere power of appointing the person who should receive the benefit. He was bound by the rules of the association, and could not change the beneficiary in a way not in conformity with them. * * * * He had no personal interest in his membership, and his personal representative, as such, can take no interest in it after his death."[2]

[1] Bishop, Adm'r'x. v. Grand Lodge etc., 43 Hun (N. Y.) 472.

[2] Eastman v. Provident Mutual Relief Ass'n., 62 N. H.

CHAPTER XIII.

Membership Fee.

SEC. 273. Note given for membership fee.
SEC. 274. Cash payment of fee.
SEC. 275. Recovery of membership fee from society.

Sec. 273. Note given for membership fee. The by-laws of some societies provide that the membership fee need not be paid in cash, but that the new member may execute his note for the amount, payable at a certain time.

In such cases, the contract of insurance usually provides that, if any such note shall not be paid when due, all claim against the society shall be forfeited, and the policy shall be void. When the contract of insurance makes such provision for forfeiture, the payment of the note at maturity is a condition precedent, and it is for the member to make prompt payment. The society need give no notice of its election to hold the policy forfeited, nor need it demand payment of the note at maturity.

But where the note only, and not the contract of insurance, makes provision for forfeiture of the policy upon its non-payment, the payment of the note is a condition subsequent, making the policy merely voidable at the election of the society, and, in order to forfeit the policy for non-payment, the society must exercise the right of election promptly. It must demand payment at maturity; if the note is entitled to days of grace, it must demand payment on the last day of grace, during the business hours of the day; and if payment is not then made, it must declare the policy forfeited and void.

It is not essential to the declaration of forfeiture that the note be returned to the maker at once. The society is, of course, bound to return it, but it may do so during the pendency of legal proceedings contesting the forfeiture.[1]

Where a contract of insurance contains no express stipulation

[1] May on Insurance at Section 342; Bliss on Life Insurance at Sections 182-187.

that the failure to pay a note given for membership fee, when due, will render the policy void, and, after a note so given becomes due, the time of payment is extended by the society, and death occurs before this time of payment runs out, no forfeiture of the contract can be declared for non-payment of the note when first due.[1]

If a society takes a draft on a third person, which is governed by the laws of commercial paper, in payment of an assessment or membership fee, this implies an undertaking on its part to present the paper for acceptance or payment, and to give the necessary legal notice of refusal to accept or pay, the same as any other holder of such paper must do; and a failure to do this will save a forfeiture of the policy, although the paper and the policy itself contain an express provision that the policy shall be void for any omission to pay at maturity a note, other obligation, or indebtedness taken for any assessment or membership fee, unless the neglect to make demand and give notice is excused by want of funds, and the absence of a reasonable expectation by the drawer of acceptance or payment by the drawee.[2]

§ **274 Cash payment of fee.** Where an application for a certificate of membership declares on its face that payment of the membership fee is a condition precedent to the issuing of the certificate, the certificate is not in force until the membership fee is actually paid. Where the prepayment of the membership fee is made an essential part of the agreement, no agent can dispense with its requirement.[3]

§ **275. Recovery of membership fee from society.** A member of a Masonic lodge, or other society not for profit, cannot, on his expulsion, recover for the initiation fees voluntarily paid by him, when no fraud is practiced on him. His expulsion does not work a rescission of the contract under which such fees are paid.[4]

[1] Kansas Protective Union v. Whitt *et al.*, Kan.; 14 Pac. Rep., 275.

[2] Pendleton *et al.*, v. Knickerbocker Life. etc., 5 Fed. Rep., 238; 7 Fed. Rep., 169.

[3] Ormond v. Fidelity Life Association, 96 N. C., 158; 1 S. E. Rep., 796; Benefit Association v. Conway, 10 Ill. App. 348; § 169 A.

[4] Robinson v. Yates City Lodge, etc., 86 Ill., 598.

CHAPTER XIV.

Assessments.—Part I.

SEC. 276. Generally.
SEC. 277. }
SEC. 278 } Assessments must be properly laid, and for proper purposes.
SEC. 279. Assessments improperly made are not binding.
SEC. 280. The act of levying an assessment is ministerial.
SEC. 281. Custom in levying assessments.
SEC. 282. Assessment for reserve fund.
SEC. 283. Assessment made in anticipation of losses.
SEC. 284. }
SEC. 288. } Notice of assessment.
SEC. 289. }
SEC. 291. } Date of notice given by mail.
SEC. 292. Date of assessment—date of notice.
SEC. 293. Notice by publication.
SEC. 294. Notice of date of payment.
SEC. 295. }
SEC. 299. } Insufficiency of notice.

Sec. 276. Generally. The main feature of the plan of mutual benefit insurance is that death losses are to be paid by voluntary contributions of the surviving members of the society, made upon a fixed and definite plan. According to this plan, the society, on the death of a member in good standing, levies an assessment upon the surviving members. A surviving member may maintain his relations with the society by paying such assessment within the stipulated time for its payment. Non-payment of the assessment within such time operates either to suspend the right to benefits, or as a resignation of his membership, and a relinquishment of all claim upon the society for past contributions and future benefits. An assessment under a certificate of membership in the nature of a policy of insurance, does not make the member holding the certificate a debtor to the society, so as to authorize it to bring suit, in case of neglect or refusal to pay. The obligatory part of the contract is unilateral, and on the part of the society; payment of the assessment is wholly optional with the members. [1]

[1] *In re* Protection Life Insurance Co, 9 Bissell 188; A. O. U. W. v. Moore (Ky.) 9 Ins. L. J. 572.

Without doubt, this general plan of insurance may be modified by the charter, by-laws, or certificate of membership of a society, in many ways, and, among others, in such a manner as to make the member liable for all death losses or assessments made from the issuing of the certificate until the day of its forfeiture. When, by the contract, the non-payment of an assessment at a certain time operates as a resignation of the member, and when the society is liable to the member's beneficiary upon its certificate until such time as the member's rights are forfeited, by reason thereof, there is nothing unjust in binding the member to pay all assessments or death losses made while he is a member, and while pecuniary rights may accrue by reason of his membership.

The Mutual Benefit Associates, by by-law, provided that, "upon the death of any member of the association, it shall be the duty of the secretary to notify the members of the same, and thereupon each member shall, within thirty days after such notification, pay to the secretary the amount required by the rules of the association." Another by-law provided that if any member should neglect to pay any dues or assessments required by the by-laws, "then, and in such case, such membership shall cease and determine at once without notice, and all claims be forfeited to the association." In construing these provisions of the by-laws, the court held that the neglect to pay an assessment for thirty days after notice thereof, *ipso facto*, determined the membership of the delinquent; that the spirit and tenor of the first by-law above quoted was an agreement of the member to pay any death loss or assessment made during the time he should continue a member of the association; that he was liable for the amount of all death losses and assessments made prior to the time when he ceased to be a member, and that, upon his failure to pay, an action would lie against him therefor.[1]

But because of the small amount of each assessment, the cost of collecting it, and their widely scattered membership, such societies do not ordinarily seek to make their delinquent members liable for assessments, under any circumstances, but make rigid provision for forfeiture in case of non-payment.

§ 277. Assessments must be properly laid, and for proper purposes. Assessments must be legally made,

[1] McDonald v. Ross-Lewin, 29 Hun 87. See §351, 352, 353.

in order that the failure of a member to pay them shall work a forfeiture of his rights of membership. They can only be valid when laid under the conditions stated in the charter and by-laws, and for the purposes named therein. They must be made in strict conformity with the authority given to the society in the charter and by-laws, and in accordance with the contract of insurance.[1] Even a more equitable mode than that provided for may not be adopted. Where the charter authorizes the directors to make an assessment, it can be made only by them. Where the laws of the society authorize directors to make assessments, they have no arbitrary discretion in the matter, but are controlled by the explicit provisions of the powers delegated to them; and assessments may not be made unless the necessity therefor properly and legally arises.[2] The requirements of the by-laws of a mutual benefit society, that all assessments shall be made by the board of directors, and that the chairman shall approve all proofs of death, are satisfied when the secretary and treasurer submits a notice of death to a meeting of the board which directs that its chairman shall examine the proofs when they shall arrive, and, if found correct, the secretary shall issue notices of assessment thereon.[3]

When the assessment is authorized and required to be made by the directors of the society, it is not invalid because the directors who made it were personally interested therein as members of the society; nor because one director was absent when it was made.[4] Where the charter gives to the directors of a society power to levy assessments upon its members to pay losses, an assessment made by a minority of the directors is invalid. And the fact that the majority of the directors appointed the minority as a committee to make the assessment, does not make such assessment valid.[5] When the by-laws so provide, the board of directors must levy the assessment.[6]

§ 278. **Same subject continued.** The liability of the member is conditional, and depends upon the contingency

[1] Agnew v. A. O. U. W. 17 Mo. App. 254; Susquehanna Mutual etc. Gackenbach (Pa.); 9 Atl. Rep. 90.

[2] Thomas v. Whallon, 31 Barb. 178; Pacific Mutual etc. v. Guse, 49 Mo. 332.

[3] Passenger Conductor's etc. v. Birnbaun, 116 Pa. St. 565; 11 Atl. Rep. 378.

[4] Williams v. German Mutual etc., 68 Ill. 387.

[5] Monmouth M. F. Ins. Co. v. Lowell, 59 Me. 504.

[6] Farmers' Mutual etc. v. Chase, 56 N. H. 341.

of death losses, and the incurring of expenses, to which he shall be liable to contribute; which have been duly ascertained by the proper officers; and which make necessary a resort to an assessment upon the certificate. The promise of the member is to pay, or forfeit his membership, upon such conditions, and the existence of these conditions must be established affirmatively before a levy of an assessment is valid and binding. An assessment made in good faith, upon correct principles, and substantially correct, is binding.[1] All assessments made pursuant to the charter and by-laws, or to the constitution and by-laws, are *prima facie* reasonable and valid. The right to levy assessments or dues upon members of the society, is governed, to some extent at least, by the occasion for them.[2]

The levying of assessments at the regular meeting of the directors, or other proper officers, is presumably a part of the business of the society, and no notice of an intention to make an assessment is necessary, unless required by the charter or by-laws. The by-laws may authorize the proper officers to lay an assessment at a meeting called for that purpose.[3]

Where a table of rates of assessment has been published by a society, and is made a part of the contract of insurance, the assessment must be made in strict conformity with the prescribed table, and the board of directors has no power to change these rates without the consent of the insured member.[4]

§ 279. Assessments improperly made are not binding. A society organized as a corporation under the laws of a state cannot subject itself or its members to the jurisdiction of an authority existing outside of the state and beyond the control of its laws.

A grand lodge of the Ancient Order of United Workmen, incorporated under the laws of the state of Michigan, cannot compel its members to pay assessments made under the orders of a supreme lodge incorporated under the laws of Kentucky, and not subject to the courts of Michigan; nor can it suspend members from their privileges, as such, for refusing to pay such an assessment. In discussing this subject the court says:

"The relator is not liable to pay the assessment. It is not

[1] Marblehead Ins. Co. v. Underwood, 3 Gray 210.

[2] Pulford v. Fire Department etc. 31 Mich. 458; Hibernia etc. Co. v. Harrison, 93 Pa. St. 264; Rosenberger v. Washington Fire Ins. Co. 87 Pa. St. 207.

[3] Ins. Co. v. Sawyer, 12 Cush. 64; Fayette Mut. v. Fuller, 8 Allen (Mass.) 27.

[4] York County Mutual Aid etc. v. Myers, 11 Weekly Notes of Cases, 541.

competent for the respondent to subject itself, or its members, to a foreign authority in this way. There is no law of the state permitting it, nor could there be any law of the state which would subject a corporation created and existing under the laws of this state to the jurisdiction and control of a body existing in another state, and in no manner under the control of our law. The attempt of the respondent to do this is an attempt to set aside and ignore the very law of its being." [1]

An assessment to pay losses and expenses, where the charter authorizes an assessment only to pay losses, is invalid.[2] A vote to make an assessment, leaving the amount in blank, is invalid.[3] An assessment is not invalid, and cannot be resisted on the ground that payment of the claim for which the assessment is made, might have been successfully resisted on technical grounds, and ought not to have been favorably passed upon by the board of directors.[4]

An assessment laid on all the members of a mutual benefit society to pay liabilities for losses and expenses, part of which accrued before some of them became members, is valid as to the old members, but void as to the new ones, unless the contract of insurance provides for the payment of all assessments that may be levied after the issue of the certificate to the member, and does not limit the liability of new members to such losses and expenses as may thereafter accrue.[5]

Where the laws of the society require that an assessment shall be levied *without delay*, on the death of a member, a prolonged delay will not necessarily vitiate the assessment when made. The circumstances attending the delay,—a controverted liability upon the certificate, a litigation to determine the rights of the parties thereunder, and similar matters, may be shown as an excuse for the delay in levying the assessment.[6]

§ 280. The act of levying an assessment is ministerial. In making assessments upon its members, a society acts in a ministerial, not in a judicial, capacity. No presumption, therefore, arises in favor of the regularity or legality of its assessment. Every fact authorizing an assess-

[1] Lamphere v. United Workman 47 Mich. 429; See State *ex rel.* v. Miller, 66 Iowa 26; 23 N. W. Rep. 241.

[2] Bersch v. Sinnissippi Ins. Co. 82 Ind. 64.

[3] Mutual Ins. Co. v. Paige, 1 Hilton (N. Y.) 430.

[4] Sands v. Hill, 42 Barb. N. Y.) 651.

[5] Ins. Co. v. Houghton. 6 Gray 77; Roswell v. Equitable Aid Union, 13 Fed. Rep. 840.

[6] People's Ins. Co. v. Allen *et al.* 10 Gray 297.

ment to be made must exist, and every act required of the society must be performed, before an assessment can be levied, which a member must pay, or forfeit his rights of membership.[1] It may be stated, as a general proposition, that when a society relies upon the failure of a member to pay an assessment as a forfeiture of his membership and the benefits thereof, it must show affirmatively—both in pleading, and in evidence at the trial—that the assessment was made by the proper authority, for a proper purpose, in the manner indicated in the source from which it derives its power to make the assessment, and in accordance with the contract of insurance. An averment that the assessment was "duly made" is insufficient.[2]

The charter, by-laws, or contract of insurance may make the records of a society levying an assessment *prima facie* evidence of the legality of the assessment laid. In such case, the mere introduction of the records, or a properly certified copy thereof, showing the levy of an assessment upon its members, and proof of the non-payment thereof, will cast upon the party suing upon the contract of insurance the burden of showing that because of some act or omission of the society, the assessment is invalid, or that the purpose of the assessment is illegal.[3] The law or contract may also provide that the record of losses kept by the society shall be *prima facie* evidence that such losses have occurred.[4]

§ **281 Custom in levying assessments.** Where the pretended assessment has not been made in accordance with the provisions of the constitution of the society, it is incompetent to show that it was made in accordance with the custom of the society, unless it is further shown that the member who failed to pay such pretended assessment had knowledge of such custom.[5]

§ **282. Assessment for reserve fund, etc.** The society stands in the relation of agent and quasi trustee for its members, and, as such, it is burdened with certain duties. It is obviously the duty of the officers of the society to observe and perform with care all the requirements of the laws, rules and

[1] American Mut., etc. v. Helburn, Ky., 2 S. W, Rep. 495.

[2] American Mut., etc., v. Helburn, Ky., 2 S.W. Rep. 496; Mut. Ins. Co. v. Houghton, 6 Gray 77.

[3] Williams v. German Mutual, etc. 68 Ill. 387.

[4] Peoples' Ins. Co. v. Allen *et al.*, 10 Gray 297; Susquehanna Mutual etc., v. Gackenbach, Pa., 9 Atl. Rep., 90.

[5] Underwood v. Iowa Legion of Honor, 66 Iowa 134.

regulations of the society, and the provisions of the certificate of membership, relative to the levying of an assessment, so that, whether the burden of proof in the matter be upon the society or its adversary, in a legal proceeding, it can easily and certainly be shown that they have done all that the society has by law or contract, been required to do and perform, and that the assessment is for a proper purpose.

An assessment for an improper and unnecessary purpose is invalid, but, in determining what are proper and necessary purposes for which a mutual benefit society may levy an assessment, the laws and contracts governing the society should receive a liberal construction. Where such a society is not inhibited by its charter, it undoubtedly has a right to provide, in its by-laws and contracts, for the accumulation of a reserve fund. While it is not intended that such associations shall become great financial institutions with growing accumulations and holdings of large sums of money and investment securities, it is still proper that they should strengthen their financial ability to pay large losses in unusual emergencies. The legislatures of several states, recognizing the propriety of a reserve fund in such societies, have passed laws providing for such a fund, and regulating its management, investment and disposition. Certainly, no just reason presents itself why such societies should not be permitted to hold a reserve or guarantee fund for the protection of its members.

The board of directors, or other officers charged with the management of the affairs of a society, must, of necessity, be permitted to exercise their discretion to a great extent in the management of the reserve fund; and where such fund has not exceeded any limit which the law may have placed upon the amount that may be held as a reserve, it must be left to the discretion of such officers, whether they will pay a loss, in whole or in part, from this fund, or levy an assessment upon the members to pay it. The idea of a reserve fund imports permanency to some extent, and if losses were required to be paid out of this fund, as they occurred, the fund would soon be depleted and destroyed, and the very object for which it was created would be defeated. A member cannot, therefore, insist that the amount of money held in the reserve fund shall be applied to the payment of losses, before he be required to pay his assessment. The officers of the society may use a part or all of the fund to pay death losses, but they cannot be

compelled to do so. It is in their discretion to hold the reserve fund, and lay an assessment to pay the loss.[1]

§ 283. Assessment in anticipation of losses. In order to determine whether assessments may be made in advance, and in anticipation of losses, it is necessary to look to the provisions of the contract of insurance--the charter, by-laws and certificate of membership. Where the contract provides that, upon the death of a member, the directors shall examine into the loss, and, if they shall find the claim of the beneficiary of the member to be valid against the society, they shall levy an assessment upon the members to pay the claim, no assessment may be made in anticipation of losses.[2]

§ 284. Notice of assessment. In beneficiary associations, where the time and frequency of payments depend on the mortality of members, and payment is to be made only upon notice that an assessment is required, no liability is imposed on a subordinate lodge, or a member of the society, until due notice, in conformity with the laws of the order or society, is given. The giving of notice is a condition precedent, and good standing is not lost by a failure to pay an assessment of which no notice was given, through the fault or misconduct of a supreme lodge or society, or its officers.[3]

The giving of the notice being a condition precedent to the accrual of a member's liability, the facts showing that the notice provided by the charter, or contract of insurance has been given, should be set out in pleading, and proved at the trial, and an averment that legal notice of the assessment was duly given, is a conclusion of law and insufficient.[4]

Where the only means which a subordinate lodge, or a member of a benefit association has of knowing when an assessment is due to the order or association, is by a notice from the supreme lodge or governing body, unless notice is given, no rights are lost. When, in the contract, a notice is

[1] Crossman v. Mass. Mut., etc., Mass., 9 N. E., Rep. 753. See §§ 133, 134.

[2] Thomas v. Whallon, 31 Barb (N.Y.), 172; Ins. Co. v. Schmidt, 19 Iowa, 502; Pacific Mut., etc., v. Guse, 49 Mo., 329; Rosenberger v. Washington Fire Ins. Co., 87 Pa. St., 207.

[3] Farrie v. Supreme Council, 15 N. Y. St., Reporter, 155; Hall v. Sup. Lodge K. of H., 24 Fed. Rep., 450; Agnew v. A. O. U. W., 17 Mo. App., 254; Castner v. Farmer's Ins. Co., Mich., 15 N. W. Rep. 452; Bates v. Mut. Ben, etc., 47 Mich., 646; Gellatly v. Mut. Ben, etc., 27 Minn., 215; 6 N. W. Rep. 627; Covenant Mut., etc., v. Spies, 114 Ill., 463.

[4] Coyle v. Kentucky Grangers, etc., Ky., 2 S. W. Rep. 676.

provided for, and not given, no tender of the amount of any assessment is necessary in order to prevent a forfeiture of membership. A member is entitled to notice of an assessment, before he can be declared in default for its non-payment.[1]

Although the charter provides for a forfeiture where the member has failed to pay within thirty days after notice has been "served on him or sent to him," the time does not begin to run until he has had actual notice. An allegation by the society that "it sent him notice" on a certain day, and that "he received the same," does not allege the time at which he received the notice, and is, therefore, not sufficient to show that there was a forfeiture.[2]

§285. Notice Continued. Where notice through the mails is relied on, it must clearly be shown, both in pleading and evidence, that the communication was placed in the post-office, properly directed, and stamped according to law.[3] Where such notice is relied on, it is not sufficient to show that three persons, members of the same family, were also members of the society, and that three notices were placed in one envelope, and directed to one of the other three members of the family.[4] Where the by-laws of a society provide for notice of assessments due, before there shall be a forfeiture of benefits, notice mailed to a member is not sufficient to sustain a forfeiture without proof that it reached him.[5] Where a party is entitled to notice, and has not stipulated to have it transmitted by mail or otherwise, he is not bound by any notice until it is actually received by him.[6] Where the contract of insurance provides that a notice of assessment shall be transmitted by mail by the society to the member, a change of residence, not made known to the society, is without effect upon it. The society has performed its duty when it has sent a notice of assessment to the address of the member, as made known to it.[7]

Notice of assessment should not be given until the assess-

[1] Hall v. Supreme Lodge, 24 Fed. Rep, 450; Covenant Mut., etc., v. Spies. 114 Ill., 463.

[2] American Mutual Aid Society v. Quire, Ky.; 8 Ky. L. Rep., 101.

[3] Haskins v. Ky., Granger's Mut. Ben. Society, 7 Ky., Law Rep. 371.

[4] Garretson v. Equitable Mutual, etc., Iowa; 38 N. W. Rep., 127.

[5] McCorkle v. Texas Ben. Ass'n., Texas, 8 S. W. Rep., 516.

[6] McCorkle v. Texas Ben. Ass'n., *supra*; Durhaus v. Corey, 17 Mich., 282; Castner v. Farmers' Mutual, etc., 50 Mich., 273.

[7] Lothrop v. Greenfield, etc., Ins. Co., 2 Allen (Mass.), 82.

ment has been made.[1] If the assessment be properly levied, but no proper notice thereof be given, no forfeiture is incurred by failure to pay it.[2] Notice from the secretary of a mutual benefit society is notice from the society, and the society is bound by the act.[3] In the absence of any agreement of the member, or any provision in the charter or by-laws, for a different mode of service, it should be made personally, as required at common law, where the object is to deprive a party of his rights or property; or if that can be dispensed with, then in such other mode as will be most likely to effect its object.[4] Unless some special mode or form of notice of an assessment be required by the charter, or contract, personal service will be sufficient.[5]

§ **286. Notice continued.** In suits upon a certificate of membership in a mutual benefit society, the controversy frequently turns upon the question whether the deceased member was so notified or informed of the assessment as to incur a forfeiture by reason of its non-payment. The notice given, in order to have such an effect, must be shown to have substantially followed, in its form and manner of service, the rules prescribed in the contract of insurance. It is often insisted, however, that it is sufficient if it appear from the evidence that the deceased member had knowledge of the assessment, derived from any source, or that he had such a knowledge as should have put him upon inquiry about it. This doctrine is not tenable. In discussing this question, the court of appeals of the state of Missouri says:

"There are many cases where a person must, at his peril, act upon the knowledge of a particular fact, however derived, or upon such information as should reasonably put him upon inquiry. But wherever the special law of the notice prescribes the form and manner in which it is to be given, especially when a forfeiture may result, the party to be affected will, as a general rule, not be bound by a notice given in any other form or manner. Thus, when a man's rights are to be adjudicated in a court of justice, he is entitled to just the form, manner, and time of notice that are directed by the statute; otherwise he will not be bound by the proceedings, although

[1] Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

[2] Frey v. Mutual Ins. Co. 43 U. C. (Q. B.) 102.

[3] Olmstead v. Farmers' Mutual etc. 50 Mich. 200.

[4] Wachtel v. Widows and Orphans Soc. 84 N. Y. 28.

[5] Jones v. Sisson, 6 Gray 288; York County Mutual v. Knight, 48 Me. 75; Williams v. German Mutual etc. 68 Ill. 387.

bodily present in the court room, seeing and hearing all that may be done. The endorser of a promissory note may have personal knowledge of the maker's intention not to pay, or of his failure to pay, at maturity. Yet the holder cannot subject him to any liability, without a notice of the dishonor, given in the form, time, and manner established by commercial law and usage. (The member) might have heard a rumor, or have been informed by a friend, that assessment number 72 had been declared, and must be paid by a certain time. But she had a right to disbelieve the rumor, or the friend, until a knowledge of the fact was brought home to her in the way for which she had stipulated in her contract with the association."[1]

Where it is shown that a deceased member of such a society knew of the assessment made upon the members, and expressed his intention of paying his assessment, these are facts from which the jury may, but are not bound to, infer that he was properly notified.[2]

The object of stipulations as to the form and manner of service of notice of assessment is to point out to the member the way in which he is to expect the notice, and to protect him in his right to have knowledge and information of the time when, and amount which, he will be required to pay. The member may waive compliance with these purely technical requirements, and if he actually receives, without objection, the notice to which he is entitled, and acknowledges the receipt of the notice, or in any way acts upon it, but does not pay the assessment, he waives the right to service in the manner and form as agreed upon in the contract.

§ **287. Notice continued.** A by-law of a society provided: "If the insured shall neglect for the space of ten days, when personally called on, or after notice in writing has been left at his last and usual place of abode or business, to pay an assessment, the risk of the company on the policy shall be suspended until the same is paid." A member was not personally called on for an assessment, and a notice in writing was not left at his last and usual place of abode or business, but he received a notice by mail, and had some correspondence with the society about the assessment. He did not pay the assessment, but made no objection to the way in which the notice reached him. In an action on the contract of insurance, it was

[1] Siebert v. Chosen Friends, 23 Mo. App. 268.

[2] Siebert v. Chosen Friends, *supra*.

held that any objection to the manner of receiving the notice, must be deemed to have been waived by the member.[1] Upon this subject, the court says: "The object of this provision in the by-law is to bring the notice of an assessment to the knowledge of the insured. But this may be waived, and it does not preclude other methods of communication, provided the purpose of the by-law in this regard is accomplished. The objection now for the first time made is purely technical, and as he actually received the notice to which he was entitled, without objection, he has been in no way injured by this departure from the by-law, and he cannot avail himself of it."

From the authorities the doctrine is fairly deducible, that a member does not, by receiving and retaining a notice of an assessment, waive any objection to its sufficiency under the contract of insurance; but that he does waive the question as to the sufficiency of the service of a proper notice upon him, by receiving it by some other method of communication than that agreed upon, acting upon it, and retaining it beyond a time when he might reasonably call the attention of the society to the irregularity and insufficiency of the service.

When the evidence is conflicting concerning the service of notice upon a member, it is for the jury to decide whether or not such service was made upon him.[2]

When, by the terms of a contract of insurance, an assessment is payable at a certain time, "or within thirty days thereafter during the continuance of this certificate," there can be no forfeiture for non-payment until after the expiration of the thirty days; and if the member dies after the certain time fixed, but before the expiration of the "thirty days thereafter," the society is liable.[3] This is not the case of the death of an insured after the premium was due, and within the days of grace. In such case, it is settled that the insured can only take advantage of the days of grace at his own risk, and if he dies before actual payment, his beneficiary cannot recover.

§ 288. Notice continued. Where the condition of a certificate of membership is, that the assured shall, within thirty days from the date of notice, pay an assessment against him, and a failure to do so shall render the certificate void, if the member dies within thirty days after receiving notice of an

[1] Hollister v. Quincy Insurance Co., 118 Mass. 478.

[2] Buckley v. Columbia Ins. Co., 83 Pa. St. 298.

[3] Rogers v. Capitol Life etc., 1 Weekly Notes of Cases 588; Baker v. N. Y. St. Mutual etc., 27 N. Y. Weekly Dig. 91; See §345.

assessment, the society will have no right to declare a forfeiture for non-payment within the thirty days.[1]

Where a member is to make payment of an assessment within thirty days from date of notice thereof, the day on which he receives the notice will be excluded.[2]

A section of the charter of the National Mutual Benefit Association provided that "any member failing to pay his assessment within thirty days from the date of the notice, shall forfeit his membership, etc." In a suit upon one of its contracts, it was shown that notice of the assessment was received by the member on October 31, 1882. The amount of the assessments due was tendered to the association on December 1, 1882, and the association declined to receive it. The court held that, in computing the time within which the money should have been paid, the day on which the notice was received by the member should be excluded, that the money should have been paid prior to the close of business hours on November 30, 1882, and that the association had a right to decline to receive the amount of the assessments tendered on December 1, 1882.[3]

§ 289. Date of notice given by mail. The charter of a society provided that members were to be "notified by the society or otherwise, either by circular or a verbal notice" of assessments made upon them for losses, and that, if they did not pay within sixty days, their rights under their policies should be forfeited. In construing this clause of the charter, the court says: "Was the fact of mailing the paper which contained the information for the member sufficient of itself to constitute the notification required by the charter? The proposition here is that it makes no difference whether the member ever gets knowledge of the assessments upon him, or not, provided notice is regularly mailed to him, and, therefore, the contention is to be viewed on the assumption that he does not get it. * * * * * * The destruction of a mail, or accidents preventing the delivery of matter, or even a considerable delay, might at any time, without fault of the persons insured eventuate in widespread loss and injustice. No construction open to so much objection, should be admitted unless rendered necessary by the terms of the charter; and

[1] Protection Life etc. v. Palmer, 81 Ill. 88; Ruse v. Mut. Ben. etc., 26 Barb. 556; Rogers v. Capitol Life, *supra*. See §294.

[2] Protection Life etc. v. Palmer, 81 Ill. 88.

[3] National Mutual etc. v. Miller, Ky.; 2 S. W. Rep. 900.

they do not require it. On the contrary, they contemplate that the members shall have real information of the assessment. The provision is not that notice or information shall be mailed or sent or forwarded. The members are to be 'notified,' that is, informed; to have made known to them the fact of the assessment; and this is permitted to be done either by oral statements to the members, or by delivery to them of written statements through the agency of the post-office or some other." [1]

§ **290. Same subject continued.** In Protective Life Ins. Co. v. Palmer Adm'r 81 Ill. 88, one of the questions was, as to the proper construction of a clause in the contract of insurance, providing that the assured should, within thirty days from date of notice, pay to the company the assessment, etc., and that a failure to do so should render the policy null and void. The evidence showed that a notice of an assessment was dated January 25, 1873, that it was mailed to the assured on February 3, 1873, but there was no evidence showing that he had ever received it. He died on March 5, 1873, without having paid the assessment. The company contended that the foregoing clause of the contract of insurance meant that the payment should be made within thirty days from the date written on the paper as a date. But the court held, that the true object of the agreement was, that the assured should be informed that an assessment had been made, which he was required to pay by the terms of his agreement; that the insurance company undertook and agreed that they would convey to him information of the fact that he had been assessed and the amount imposed, and that he agreed that, after they should put him in possession of the fact, he would pay the amount within thirty days. And the court further held, that the time within which payment is to be made, is not to be computed from the actual date of the notice, or from the day it was mailed to the member, but, when sent by mail, from the time at which the notice would, in regular mode of carrying the mail, be received by the member during business hours. The company was held liable on the policy.

In discussing the questions involved in the case of The National Mutual, etc. v. Miller, 2 S. W. Rep. 900, the Court of Appeals of Kentucky recognize this to be the true rule in determining the date of notice of assessments in like cases.

[1] Castner v. Farmers' Mutual, etc., 50 Mich. 273.

§ **291. Same subject continued.** A by-law of a society provides that a policy issued by it shall become void "if the assured shall neglect, for the term of thirty days, to pay * * any assessment * * when requested to do so by mail or otherwise." In construing this by-law, the court held, that, by the neglect of the assured to pay the amount of an assessment, for thirty days after a written request for payment, prepaid, duly directed, and deposited by the society in the post-office, would, in due course of mail, reach the place of his residence, as set forth in the policy, the policy was forfeited and rendered void, and that such neglect to pay worked a forfeiture of the policy whether he received such request or not.[1]

A by-law of a society provided that, whenever any assessment should be levied, and notice thereof be forwarded to the insured by mail or otherwise, and the insured should for the space of thirty days after such notice refuse or neglect to pay the same, the policy might be declared void. In construing this by-law, the court says: "In contemplation of law the plaintiff had notice when in the ordinary course of mail the notice should have reached (the member's post-office address). It would greatly embarrass the defendant, if not render the transaction of its business impracticable, if it should be required to prove actual delivery of notice to the party assessed. By express stipulation it is agreed that the policy may be forfeited for refusal or neglect to pay an assessment within thirty days after notice thereof forwarded to the insured by mail. In mailing the notice the company did all it was required to do.[2]

A certificate of membership provided that the member should be notified of each assessment "by written notice deposited in the post-office in the city of New Orleans, addressed to such address as has been left in writing at the office of the association with the secretary," and that "on his failure to pay said assessment within thirty days from the time that notice is given to him that said assessment is due, this policy shall become null and void." A notice in writing deposited in the post-office in New Orleans addressed to such address as has been left, etc., is a sufficient notice of assessment, and no evidence will be admitted to show that the member did not receive the notice.[3]

[1] Lothrop *et al.* v. Greenfield Mutual, etc., 2 Allen (83 Mass.) 82.

[2] Greely v. Iowa State Ins. Co., 50 Iowa 86.

[3] Epstein v. Mutual Aid, etc., Association, 28 La. Ann. 938.

§ 292. **Date of assessment—Date of notice.** A by-law of an association provided that "every member failing to pay his assessment within thirty days from the date of such assessment, shall stand suspended," etc. In construing this by-law, the appellate court of Illinois held that the duty of the association was complete upon mailing the assessment, and that the failure of such assessment to reach the assured, by reason of its miscarriage in the mail, or the absence of the assured, would not excuse the non-payment of the assessment within the prescribed time. The court says: "In the case of Protection Life Ins. Co. v. Palmer 81 Ill. 88, where the policy is declared by its terms to be forfeited unless payment is made within thirty days from the date of notice, it is not unreasonable to hold that these words '*date* of *notice*' refer to the time when the knowledge of the facts contained in the letter reach the assured, for the word 'notice' has a double meaning, and is often used to signify either the paper or other instrumentality used to give information, or the information itself. No such ambiguity can arise by the use of the word assessment. It cannot refer to two distinct periods. The date of the assessment means necessarily the time when it is made out by the secretary and mailed to the assured in accordance with the terms of the by-laws." [1]

§ 293. **Notice by publication.** A contract of insurance provided that the society should notify its members of assessments by publication for five days in certain newspapers, and that the members should pay the assessments within thirty days after notification. The court held that under this contract the member was allowed the entire thirty days, commencing and counting from and after the last five days of publication, and that the society could not claim the forfeiture of the policy for non-payment of assessments until thirty days after the last of the five days of publication had expired.[2]

§ 294. **Notice of date of payment.** A society sent out the following notice to its members: "Mortuary assessment No. 30 will be due and payable on or before the first day of May, 1872." Without having paid that assessment, the insured died on the night of May 1, 1872 before

[1] Weakly v. N. W. Benevolent, etc., 19 Ill. App. 327; see Greely v. Iowa St. Ins. Co., *supra;* Epstein v. Mutual Aid, etc., *supra.*

[2] Wetmore v. Mutual Aid & Ben., etc., 23 La. Annual 770.

midnight. There was nothing in the contract providing at what hour the assessment should be paid, or the policy be forfeited, and no provision, as is generally the case in insurance contracts, that the policy should cease at noon on the day named, if the assessment should not be paid. The court held that the policy continued in force until midnight of May 1st, and that the society was liable.[1]

§ **295. Insufficient notice of assessment.** The notice must conform to the laws and contract, or it is invalid. No forfeiture can be declared for non-payment of an assessment where the notice is insufficient.

Where the contract of insurance provides that the member shall pay $2.50 quarterly for expenses, and that he shall forfeit his membership if the quarterly dues shall not be paid within thirty days after notice, a notice to pay $10.00 as annual dues, in advance, is not a sufficient notice.[2]

Where the charter and by-laws of a mutual benefit society provide that, where the board of directors shall order an assessment, the secretary shall prepare it, and that it shall be signed by him and a majority of the board, an unsigned and uncertified paper containing no headings to explain the figures set down in it, cannot be treated as an official assessment for the purpose of forfeiting the policy of one who had not paid the amount of his assessment until after the expiration of the period fixed by notice to him.[3]

The articles of incorporation and by-laws of a mutual benefit society required that assessments be made by the secretary, and the certificates of membership provided that assessments be payable within thirty days after notice from the secretary. It was held that the notice contemplated was notice of the assessment, and that the certificate was not forfeited by neglect to pay assessments that were not imposed by the secretary—but, only, if at all, by persons claiming to be managers, and where the only notice from the secretary was a notice of forfeiture.[4]

The by-laws of a society provided that, upon the death of a member, the secretary should notify the members through local agents, and each member should, within ten days thereafter pay his dues, and if he should neglect to do so for forty

[1] Och v. Homestead, etc., Ins. Co., 4 Pitsburg Leg. Journ. 98.

[2] Mutual Endowment etc. v. Essender, 59 Md. 463.

[3] Baker v. The Citizens Mutual etc., 51 Mich. 243.

[4] Bates v. Detroit Mut. etc., 51 Mich. 587.

days, he should forfeit his membership. The court, in construing this by-law, held that it would be unjust and unreasonable to hold the mere notice to the local agents as notice to members, and that the provision must be construed to mean that, the local agents being notified, they must notify the members within ten days thereafter, and, upon receipt of such notice, the members for the first time become legally bound to pay the assessments, and must pay within forty days.[1]

Where a notice shows that the assessment was levied by the society, instead of by the board of directors, the notice is sufficient, as, in legal effect, it is the same thing.[2]

A notice which contained only a *fac simile* of the seal of the lodge, was held sufficient notice of assessment, where it did not appear that the laws of the society required an impress seal mark to be placed upon the notice. Defects of form merely are not material, where the notice gives to the member actual information of the assessment.[3]

§ 296. Same subject continued. A notice to do an act, which is required to be given by a particular person named, contemplates the personal action and judgment of the person authorized to give such notice, and involves the exercise of power and discretion to be exerted by the individual himself, which he cannot delegate to another. Thus, where a by-law of a mutual benefit society provides that the local secretary shall give notice of assessments to members, and another by-law declares that a member, by a failure to pay after notice by the general secretary shall forfeit his right to benefits, a member is entitled to notice from both secretaries, and a card on which the name of the general secretary is printed, but which is filled up and addressed by the local secretary, is not sufficient to constitute a notice from the general secretary.[4]

When, according to the by-laws of a mutual benefit society, the notice to members requiring them to pay assessments, must contain a list of all deaths that have occurred since the last assessment, and notify the member of the amount due from him to the benefit fund, a forfeiture of membership cannot be

[1] Coyle v. Kentucky Grangers etc. Ky. 2 S. W. Rep. 676.

[2] Williams v. German Mutual etc. 21 68 Ill. 289.

[3] Karcher v. Supreme Lodge, 137 Mass. 36.

[4] Payn v. Mutual Relief Society, 17 Abb. (N. Y.) N. Cas. 53.

sustained for failure to pay an assessment, when the notice thereof did not conform to the by-laws in these respects.[1] Where provision is made for the publication of a list of the deaths, it will be presumed that the members adopted such a provision in order to see the necessity of the assessment; and where the society agrees to notify the member of the amount due from him on an assessment, he has a right to rely upon the amount as stated in the notice, and where no amount is stated the notice is manifestly insufficient.

§ **297. Same subject continued.** By a clause of the certificate of membership, a forfeiture was authorized if the member failed to pay an assessment called for, within thirty days after a publication of the notice for five consecutive days. Subsequent to the issuing of the certificate, the society addressed a notice of an assessment to the insured, who resided in New Orleans, on which the following indorsement was printed: "Members residing in the city of New Orleans are hereby notified that the notices of assessments due by them on death of a member are only given through newspaper publication—in special notice column—for eight consecutive days; being always published on the first Sunday of the month and continued through the week, including the second Sunday. Payment is required at the office within thirty days from date of publication; the failure to make payment within thirty days operates a forfeiture of his or her policy, and the name of such delinquent will be erased from the books of said association. Notices of assessments are published in the New Orleans *Times*, New Orleans *Bee*, the *Daily Picayune* and *German Gazette*. Special notices will not be sent to residence or business location." While this indorsement remained unrecalled, it was a voluntary extension of the time of the publication, in order to effect a forfeiture as agreed to in the contract of insurance; and under this agreement the forfeiture would not occur unless there was a failure to pay the assessment called for, after thirty days from the publication of notice for eight consecutive days. Where the notice, therefore, under which forfeiture was claimed was only published for seven days, it was held insufficient.[2]

§ **298. Same subject continued.** A mutual benefit society provided in its by-laws that if a member should fail

[1] Miner v. Michigan Mutual Ben. Ass'n., Mich.; 29 N. W. Rep. 852.

[2] Fitzpatrick v. Mutual and Benevolent etc. Co., 25 La. Am. 443.

to pay his assessment for ten days after notice thereof by publication, his wife should have no benefit fund in case of his death; and if he should fail for thirty days so to pay, he might be expelled. A by-law of the society provided for publishing notice of every death and assessment, and of the time when the same was required to be paid, and also provided that a collector should be appointed to notify members in arrears for such dues, and to collect them. A member died in April 1873, and notice was published in two newspapers in the city where the members resided, stating the fact, and that dues on account thereof were payable April 30, 1873. B., another member, was drowned on May 11, 1873. There was no evidence that he was aware of the death of the member who died in April, or that he knew of the publication of notice in the newspapers. The collector of the society did not call upon him for, or notify him of the assessment. The society refused to pay the benefit fund to B.'s widow. The court held that members of this society did not bind themselves to ascertain the fact of the death of a member from publication only at the risk of forfeiting their interest in the benefit fund, and that B. did not lose his right to have this fund paid to his widow, as he had no knowledge of the death of the party on whose account he had been assessed, or of the publications in the newspaper; and until he had, or until after demand made upon him by such collector, his right to pay such assessment and preserve his rights in the fund continued.[1]

A notice of an assessment is invalid, which requires payment to be made before the expiration of the time in which the member may, by the contract, make the payment.[2]

Thus, where the by-laws of a mutual benefit society provide that, upon the failure of a member to pay his assessment within *forty* days after notice from the secretary of the death of a member, his claims upon the society shall be forfeited, a notice from the secretary requiring payment to be made within *thirty* days is a nullity, as there is no authority for the issuing of such a notice.[3]

Where the by-laws provide that the notices of assessment shall be given by publication in *three* newspapers published in the county where the society is doing business, it is not suffi-

[1] Mutual Relief Society v. Billau. (Superior Court of Cincinnati) 3 Am. Law Record, 546.

[2] Frey v. Wellington Mutual, 4 Ontario 293.

[3] Haskins v. Ky. Grangers' Mutual etc., 7 Ky. Law Rep. 371.

cient to show that such notices were published in *two* papers in that county.[1]

§ 299. **Same subject continued.** In the case of Ancient Order United Workmen v. Moore, Ky.—1 Ky. L. Rep. 93, the principle is laid down that if ample notice is given, it is not necessary that the full time allowed by the charter shall intervene between the date of the assessment and the suspension of the rights under the benefit certificate.

The constitution of a society provided that "written notices of assessment shall be made and sent by the financiers, bearing date of not later than the 8th of the month, in which the notice was issued by the supreme recorder, twenty days from the date of such notice by the financier, and not later than the 28th day of said month in which said notice of assessment was given, any member holding a certificate of the beneficiary fund, having failed or neglected to pay such assessment into the beneficiary fund, in his subordinate lodge, shall forfeit all his rights under such certificate."

The court says: "Although the notice required to be given by the financier was not sent until the 9th or 10th of February, there was ample time, after it was sent, to pay the assessment before the 28th, and the law required it to be paid on that day, although there was not twenty days between the day the notice was sent, and the 28th day of the month."

If the principle announced in this case were generally recognized, an element of great uncertainty would exist in regard to the sufficiency of notices of assessment in mutual benefit insurance. Happily, the case does not seem to have been followed as an authority upon this point. The interpretation given to the clause of the constitution just quoted seems to be contrary to the well settled rule of construction, that the language shall be taken most strongly against the insurer.

[1] Sande v. Groves, 58 N. Y. 94.

ASSESSMENTS.—Part II.

SEC. 300. } Payment of assessment.
SEC. 302.
SEC. 303. Payment to subordinate lodge—agency of lodges.
SEC. 304. Receipt of assessment may be contradicted.
SEC. 305. Tender of assessment.
SEC. 306. Refusal of society to accept assesssment—remedy of member.
SEC. 307. } Forfeiture for non-payment of assessment.
SEC. 309.
SEC. 310. } When affirmative act of society declaring forfeiture is
SEC. 313. required.
SEC. 314. } When affirmative act of the society declaring forfeiture is
SEC. 320. not required.
SEC. 321. } Restoration after suspension or forfeiture.
SEC. 325.

§ **300. Payment of assessment.** Where a policy of insurance issued by a mutual benefit society provides that, if any assessment owing by the assured shall not be received by the society within thirty days from the date of notice, the policy shall be null and void, and there is no provision either in the contract of insurance or the notice, stipulating the mode of remitting the assessment, the member is bound to see that the money is actually received by the society within the time specified, or forfeit his policy.

But where a notice directs the member to remit the amount by post-office order, or draft payable to the society, the right to forfeit the policy, by reason of the non-payment of the assessment within the time limited by the policy, is waived, and all that the member can be expected to do, under such circumstances, is to promptly observe such directions. When he has done so, he has a right to suppose his dues are paid, and he cannot be expected to know to the contrary until notified by the society, or until the lapse of a reasonable time to receive a notice from the society.[1]

In all cases where by the direction or agreement of the creditor, money is sent by mail in discharge of a debt, proof that a letter, containing the requisite sum, duly sealed and

[1] Protection Life Ins. Co. v. Foote, 79 Ill. 361.

directed, was deposited in the post-office, is sufficient to maintain a plea of payment.[1] This doctrine rests on the principle that the debtor has done all that was in his power to perform the contract, and that the risk of transmission was assumed by the creditor.

§ 301. **Payment of assessment continued.** The decision of the officers respecting the construction of a contract of insurance, and the custom of paying assessments, arising under such decision, are not binding upon members.

Where the contract provides for the payment of assessments to an officer of the society, and those in authority in the order decide that they must be paid at a meeting of the lodge, and cannot be paid otherwise, and a custom of so paying them grows up in the order, the terms of the express contract of the parties, and not the custom or habitual mode of doing business, must determine the rights and duties created by that contract.[2]

It may well be doubted whether it is competent for those representing a mutual assessment life insurance association to accept anything less than the total amount of the assessment laid upon a member, or to accept as payment thereof anything but money. If this course of dealing might be carried on with one member, it might also be done with all members, and thus the sole purpose of such an organization might be hindered and defeated.[3]

In Ancient Order of United Workmen v. Moore, Ky., it was held that where a member of a subordinate lodge had money due him for "sick benefits," it was not the right of his lodge to appropriate it in payment of an assessment ordered by the grand lodge, without the members direction, Pryor, C. J., dissenting. The majority of the court based their opinion on the distinction between the funds created by assessments ordered by the grand lodge, which were for the benefit of the families of members after their death, and the dues collected by the subordinate lodges, which were for the payment of "sick benefits" to sick members.[4]

§ 302. **Payment of assessment continued.** Where the treasurer of a subordinate council remitted to the

[1] Warwicke v. Noakes, 1 Peake R. 67; Hawkins v. Rutt, Ib. 186; Kington v. Kington, 11 M. & W. 233.

[2] Manson v. Grand Lodge 30 Minn. 509; Wiggin v. Knights of Pythias 31 Fed Rep. 122.

[3] Protection Life Ins. Co. v. Foote, 79 Ill. 361; Buffum v. Fayette Mut. Ins. Co. 3 Allen (Mass.) 360; Hoffman v. John Hancock Mutual etc. 92 U. S. 161.

[4] 9 Ins. Law Journal 539; See Hawkshaw v. Supreme Lodge, 29 Fed. Rep. 770-774.

supreme treasurer of the society an amount which equaled, and was received as, the aggregate amount due from his council for each member thereof, and the remittance included the amount assessed against him, the fact that the payment of his assessment was made by him directly to the supreme treasurer, instead of indirectly through the collector, as provided by the rules of the council, may not be urged to deprive his widow of the benefit of such payment.

The main purpose of such rules for the collection of assessments, is to put into the hands of the supreme treasurer the amount payable by each member of the society. If the money gets into the treasury, it matters little by what path it got there, so far as the rights of the beneficiary are concerned.[1]

§ 303. Payment to subordinate lodge—agency of lodges. Where a local lodge admits a member into a mutual benefit society, collects his admission fee and all assessments levied upon him, and remits such assessments to the supreme lodge or directory of the society, it is to be regarded as the agent of the supreme lodge or directory, at least to this extent, that payment of assessments to the local lodge is a payment to the higher body of the order. The default of the local lodge in paying over to the higher body of the order the assessments paid to it by its members, does not affect the rights of such members.[2]

The relations which local and subordinate lodges of such societies shall bear to the supreme lodge or directory, and the members of the order, are proper matters for regulation in the by-laws of the society. Where the by-laws on the subject are artistically and plainly drawn, it is not difficult to determine these relations, but they frequently contain so many inconsistent and vague provisions on the subject that a consistent interpretation and construction of them is impossible.

A by-law of the supreme lodge of the Knights of Honor provided that "any lodge failing, neglecting or refusing to forward the same" (assessment laid upon it) "within thirty days from the date of said notice, shall stand suspended," and that "if a death occur in said lodge during such suspension, no death benefit shall be paid," etc. In construing the meaning

[1] Farrie v. Supreme Council, 15 N. Y. St. Reporter, 155.

[2] Schunck v. Gegenseitiger Wittwen und Waisen-Fond, 44 Wis. 369; Erdmann v. Mut. Ins. Co., Order Herman's Sons, 44 Wis. 376; Barbaro v. Occidental Grove, etc., 4 Mo. App. 429.

of this by-law the Supreme Court of Indiana says: "This by-law contemplates the restoration of the delinquent lodge on the payment, after suspension, of the required assessment, for it prohibits the payment of such benefits when death occurs *during such suspension*. Now, the question arises, what is meant by the words 'if a death occurs in such lodge during such suspension, no death benefit shall be paid?' Is it meant by the provision to cut off absolutely, as forfeited, all right to death benefits of a member in good standing, who dies during the suspension of his lodge, and who was not in default in the payment of his dues or otherwise, because his lodge was in default at the time of his death, though his lodge afterwards pays up and is restored? This would be a harsh construction, and one that cannot be adopted, if the provision admits of any other reasonable interpretation. Forfeitures are not favored in law, and instruments will be so construed as to avoid them, if it can be done without doing violence to the language employed, * * * * . We think the provision, fairly construed, means that where a death occurs during the suspension of the subordinate lodge, no death benefit shall be paid during such suspension, as if it read as follows: 'If a death occur in said lodge during such suspension, no death benefit shall be paid during such suspension.' This construction seems to us to be reasonable and well calculated to carry out the general purpose of the defendant's organization. When a subordinate lodge is thus suspended, no death benefits are to be paid on behalf of members dying during the suspension. This is a strong incentive to the delinquent lodge to respond to the calls upon it, and be restored. When restored, the rights to death benefits, which were suspended with the suspension of the lodge, are restored with its restoration." [1]

§ 304. Receipt of assessment may be contradicted. An acknowledgment in a certificate of membership that the admission fee and certain assessments have been paid, may be contradicted or explained; it is not conclusive, and does not operate as an estoppel.[2]

But where a certificate provided that if a "binding receipt" should be issued, and the "number of a binding receipt is inserted, it becomes conclusive evidence that the above amount has been paid," and the number of a binding receipt was inserted in the certificate, it was held that, as against the bene-

[1] Supreme Lodge v. Abbott, 82 Ind. 1.

[2] See Bliss on Life Insurance at section 376.

ficiary, the insurer was estopped from averring that the assessment, acknowledged in the policy and in the "binding receipt" to have been received, were not paid.[1]

Some authorities go so far as to hold that, upon grounds of public policy, an insurance company will be estopped to deny, as against its acknowledgment in its policy, that the consideration for the policy has been paid.[2]

But, according to the weight of authority, the recital in a delivered policy, of the receipt of the consideration for which it was issued, is *prima facie*, and only *prima facie* evidence of the fact.[3]

§ 305. Tender of assessment. The tender of an assessment is just as effectual to preserve the rights of a subordinate lodge and its members, or the rights of a member of a mutual benefit society, as the payment of the assessment. For the purpose of avoiding penalties and forfeitures, or the loss of any right or privilege, a tender is the exact equivalent of payment. It does not have to be repeated. After the tender is made, the burden is on the creditor to act. He must demand the debt, and it is only required of the debtor that he be ready to meet the demand.[4]

In mutual benefit societies, the holder of a certificate is entitled to notice of assessments before he can be declared in default for their non-payment, and, in the absence of notice, no tender of the amount of such assessments is necessary, in order to prevent a forfeiture of membership.[5]

If a member who has been expelled from a society, appeals to a higher tribunal within the order, or resorts to court for reinstatement as a member, and, pending the appeal or legal proceedings, regularly tenders his dues and assessments until his death, his beneficiary, on a reversal of the judgment, or upon a reinstatement by the court, after his death, will be entitled to the benefit.[6] If dues or assessments in a society

[1] Kline v. National Benefit Ass'n, 111 Ind. 462; 11 N. E. Rep. 620 National Benefit Ass'n v. Jackson, 114 Ill. 533.

[2] Provident Life, etc., v. Fennell. 49 Ill. 180; Teutonia Life Ins. Co v. Anderson, 77 Ill. 384; Grit v. National Insurance Co., 25 Barb. 189; 3 Kent's Com. 260; Insurance Co. v. Cashow, 41 Md. 59.

[3] 1 Greenleaf Ev. at section 305; Ins. Co. v. Carpenter, 4 Wis. 20; Bergson v. Ins. Co., 38 Cal. 541; Ins. Co. v. Smith, 3 Whart. 520; Sheldon v. Ins. Co., 26 N. Y. 460; Baker v. Ins Co., 43 N. Y. 283; Ins. Co. v. Hasbrook, 32 Ind. 447.

[4] Hall v. Supreme Lodge K. of H. 24 Fed. Rep 450; People v. Mutual Life, 92 N. Y. 105; Meyer v. Ins. Co. 73 N. Y. 516.

[5] Covenant Benefit Ass'n. v. Spies *et al.* 114 Ill. 467.

[6] Marck v. Supreme Lodge, 29 Fed. Rep 896.

are payable at a certain fixed time, it would be the safe course for a member seeking to reverse a judgment of expulsion, or to be restored to membership, to tender the dues and assessments as they become due. If, however, assessments are payable only after notice, the member will be under no obligation to make the tender until he has been notified of the assessment.

§ 306. Refusal of society to accept assessment —remedy of member. Where a mutual benefit society has refused to receive from the member the amount of the assessment on his certificate, basing such refusal on the ground that the rights of the member had been forfeited by non-payment of the assessment at the time stipulated for its payment, the member, if the refusal is wrongful, has an election of remedies. He may, if it be practicable under the plan of paying assessments, tender the assessments as they become due until the certificate is payable, and then his beneficiary may recover the amount provided for therein in an action thereon. He may, in an action for the recission of the contract, recover back the assessments paid, with interest. Or he may maintain an action to obtain a judgment ordering that the certificate shall be continued in force.[1]

§ 307. Forfeiture for non-payment of assessments. In mutual benefit societies, provision is made either in the charter, by-laws, or contract of membership for assessments upon members to pay death losses, and for forfeiture of all rights of membership, in case of non-payment thereof by members, in accordance with the rules and regulations upon the subject of their payment. As these societies have no means of meeting their obligations, except from the payments made upon assessments, it is proper, and even necessary, to make stringent provisions for their prompt payment.

Provisions for forfeiture in case of non-payment within a certain stipulated time, have been repeatedly held to be valid and binding in ordinary life policies, and there are many reasons why they should be more rigidly applied in mutual assessment societies.[2] As before stated in this chapter, the levy of an assessment by a mutual benefit society, as a general rule, creates no liability on the part of the member to pay, and it is, therefore,

[1] Union Cent. L. Ins. Co. v. Pottker, 33 Oh. St. 459; Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; Day v. Conn. Gen. L. Ins. Co., 45 Conn. 480; May on Ins. at section 356 *et seq.*; N Y. Life Ins. Co. v. Statham, 93 U. S. 24; Phoenix Ins. Co. v. Baker, 85 Ill. 210.

[2] Madeira v. Merchants' Exchange Mutual etc., 16 Fed. Rep. 749.

apparent that rigid and stringent provisions for forfeiture for non-payment of assessments are necessary for the existence of such societies.

A certificate of insurance, issued to one of its members by a society, in which the plan of meeting its losses and expenses is by levying assessments upon its members for their contributions, is not forfeited or suspended by the failure of a member to pay an assessment thus levied, unless such forfeiture or suspension is provided for as a part of the contract of insurance.[1]

§ **308. Forfeiture continued.** One of the by-laws of a society provided for giving written notice to any member in arrears six months for dues, calling his attention to the fact that he will be stricken from the roll, in case he does not pay his dues. Another by-law imposed a fine for an omission of a member to give notice to the society of a change of residence. At the time of joining, plaintiff's intestate gave notice of his then place of residence. He subsequently changed his residence, but did not give notice. Because of failure to pay his dues, his name was stricken from the rolls. No notice was given him as provided by the by-laws. In an action brought to recover the sum provided by the society's by-laws, to be paid on the death of a member, it was held that plaintiff was entitled to recover; that the omission of the deceased to give notice of his change of residence was no excuse for a failure to give him the prescribed notice.[2]

Where the contract of insurance is silent as to whether a member in default shall have notice of his proposed expulsion, such notice must be given in order that he may have an opportunity to be heard.[3]

Where, by the by-laws, notice is required to be given to members who fail to pay their assessments, there can be no forfeiture without such notice.[4]

A by-law of a society is to the effect that, "when a member neglects for six months to pay his contributions, or the entire amount of his entrance, the society may strike his name from the list of members, and thereupon he no longer forms

[1] District Grand Lodge v. Cohn, 20 Ill. App. 335; Sanford v. Cal. Ins. Association, 63 Cal. 547; Mut. Ben. Life Ins. Co. v. French, 30 Ohio St. 240.

[2] Watchel v. Widows and Orphans Society, 84 N. Y. 28.

[3] Fritz v. St. Stephen's Society, 62 How. Pr. 69.

[4] Pulford v. Fire Department etc., 31 Mich. 458; Wachtel v. Benevolent Society, 84 N.Y. 28; People v. Benevolent Society, 24 How. Pr. 216.

part of the association. To that end, at each regular general meeting the collectors-treasurers are bound to make known the names of those thus indebted for six months' contributions, or for a balance of their entrance; and thereupon any member may make a motion that such members be struck from the list of the society's members." Under this by-law, a member may not be expelled without notice and opportunity to be heard upon the subject of his arrearage.[1] Such a by-law does not take from a delinquent member either expressly or by implication, the right to notice, and this right is valuable, because, on such notice, a member may give a sufficient excuse for his delinquency, or, on hearing him, the society may be inclined not to exercise rigor in enforcing the penalty of default.

§ **309. Forfeiture continued.** A mutual benefit society was organized for the express purpose of becoming the successor of "The Widows' and Orphans' Mutual Aid Society." A resolution of the new society provided for the surrender of the old certificates, and the issue of new certificate by it as successor, and further provided: "all assessments made by the old society on its members, not due at the time of transfer of the member from the old to the new organization, shall become due and payable to the latter on the day it would become due and payable to the society, had the member not been transferred therefrom."

A member surrendered his old certificate and received a new one from the new society. This stipulated for the payment of a certain sum, and provided that "a failure to pay at the home office any assessment made by the society within the prescribed time, shall work a forfeiture of this certificate, and the party can only be reinstated on terms as set forth in the by-laws." In an action on the certificate, the society set up the non-payment by the deceased member of an assessment made against him by the old organization, to meet a death loss while he was a member thereof, and which sum, by the terms of the resolution under which he was admitted to membership in the new society, became payable to it, but it was held that, under the contract, a failure to pay assessments made by the new society, not by the old, worked a forfeiture.[2]

§ **310. When affirmative act of society is**

[1] Lapierre v. L'Union St. Joseph 21 Lower Canada Jurist 332.

[2] Mutual L. & A. Society v. Miller 23 Ill. App. 34.

required. The charter of a society provided "should any member neglect to pay his arrearages for three months, he shall be expelled." In construing this provision, the court said:

"There must be some act of the society declaring the expulsion, and this cannot be done without a vote of expulsion, after notice to the member supposed to be in default. For it may be, that he may either prove that he is not in arrears, or give such reason for his default as the society may think sufficient. If he is present when the subject is taken up, and willing to enter into the inquiry immediately, there is no occasion for further notice. But no man should be expelled in his absence without notice. It appears that Hansell was present, but no question was made, nor any vote taken on his expulsion. He had an excuse to offer, viz., that the society was indebted to him, for his services as secretary, in a larger sum than the amount of the arrears of his monthly contribution. And had he urged this defence when the question of his expulsion was put, there is no saying what influence it might have had on the vote. Be that as it may, he ought to have had the opportunity. The terms of the charter have not been complied with."[1]

§ **311. Same subject continued.** The constitution of an incorporated voluntary society, after providing that every member shall pay into the treasury a designated annual contribution to become due and payable on January 1, of each year, declares that if the contribution is not paid by the first meeting in April, thereafter, the defaulter shall forfeit his membership, and his name shall be stricken from the roll of members, "and of this he shall be duly notified by the secretary;" and imposes upon the treasurer the duty of serving, on or about March 1, of each year, upon every member in arrears, a written notice, calling his attention to the foregoing requirement. It is further declared that "the first regular meeting in April of each year, shall be the regular meeting for the revision of the roll of members," at which the treasurer is required to report "the names of all members whose dues for the year have not been paid," and all such names "shall be immediately stricken from the roll." The treasurer is declared to be "personally responsible to the society for the dues of all defaulting members not so reported." It further provides

[1] Commonwealth v. Pennsylvania Beneficial Institution, 2 Sar. & Rep. 141; See also Sibley v. Carteret Club, 40 N. J. L. 296.

that the treasurer "shall report to the society, at the annual meeting for the revision of the roll, a written statement of the names for members who are in arrears of the dues of the year, so that they may be stricken from the roll; but this written statement shall not be spread upon the minutes." Another article provided in detail for the order of business at what is designated as "the regular meeting for the revision of the roll," specifying, *inter alia*, "the treasurer's report of members in arrears" and the "revision of the roll by the secretary." It is also declared that "any one of these orders of business may be suspended at any time by the vote of a majority of the members present at any meeting."

In construing these several provisions *in pari materia*, as they should be construed, the Supreme Court of Alabama held that the non-payment of annual dues by a member, by the first meeting in April, is not, *ipso facto*, a forfeiture of membership, but only a ground of forfeiture, in the nature of a judgment *nisi*, to be made final by the vote of the society; that where no statement or report had been made by the treasurer at the regular meeting in April, as required by the constitution, and no vote of the society had been taken on the subject, the mere reading, at that meeting, of the name of a member from a book as a delinquent, did not operate to forfeit his membership; that the action of a society at a subsequent meeting, of which such delinquent had no notice, actual or constructive, declaring a forfeiture of his membership for non-payment of dues, was irregular and not binding on him, and on his application, *mandamus* would lie to vacate it, and restore him to membership.[1]

§ 312. Same subject continued. The laws of the society provided that members should pay their assessments within thirty days after notice, and the society's record showed a suspension before the expiration of that time. There was no other evidence, and the court held that such suspension afforded no proof of the non-payment of an assessment, nor of any default of the member. There being no evidence of the non-payment of an assessment, the member could not be held to be in default by reason of having made no application for reinstatement, under rules wholly applicable to suspension for the non-payment of assessments.[2]

[1] Medical Society v. Weatherly 75 Ala. 248.

[2] Lazensky v. Supreme Lodge K. of H., 31 Fed. Rep. 592.

Forfeiture of membership for non-payment of assessment cannot be declared *nunc pro tunc* after the loss, if the policy was in force when the loss took place, and a member cannot be suspended after his death, for non-payment of assessments, so as to avoid a policy in force at the time of his death.[1]

The charter of a society provided that, if a member did not pay his assessment within thirty days after demand, his insurance might be suspended by the secretary or board of directors, but if suspended by the secretary, appeal might be made to the board of directors when in session, and it was held that such forfeiture could not properly be imposed as an *ex parte* result of mere default in payment, and without giving the assured an opportunity for hearing.[2]

§ 313. Same subject continued. S. was a member of a subordinate lodge of Independent Foresters, and thereby, by the constitution and by-laws, became a member of the grand lodge. The death assessments were required to be collected by the subordinate lodge, and forwarded to the grand lodge, the subordinate lodge being compelled to account for these assessments, and pay them to the grand lodge, unless the member had been expelled or suspended. The assessment of S. was paid by the subordinate lodge to the grand lodge, but, at the time of his death, had not been paid by him to the subordinate lodge. The by-laws provided that "any member failing to pay his assessment within thirty days shall be suspended," and also provided that notice should be given to the grand secretary of the grand lodge.

On the death of S. his widow brought suit for the amount due from the grand lodge, and the court held that the mere non-payment of assessment did not of itself operate as a suspension, nor did the clerical act of the secretary in marking S.'s account suspended. The suspension must be by some affirmative act of the lodge. Such suspension may be waived by the lodge, either expressly, or by failure to act. The grand lodge having received the assessment, was liable to the widow.[3]

§ 314. When affirmative act of the society declaring forfeiture is not required. However abhorent it may be to all reason to permit the expulsion of a member,

[1] Olmstead v. Farmer's Mutual, etc., 50 Mich. 200; Baker v. Citizens Mutual, 51 Mich. 243.

[2] Olmstead v. Farmer's Mutual, etc., 50 Mich. 200.

[3] Scheu v. Grand Lodge, etc., 17 Fed. Rep. 214; see Hall v. Supreme Lodge K. of H., 24 Fed. Rep. 450.

without notice and hearing, or opportunity to be heard, for an alleged violation of his duty as a citizen, or a corporator, and notwithstanding the fact that a by-law providing that on such charges a member may be expelled, by a vote of the society in his absence and without notice, is illegal and invalid, it may be laid down as certain that, from the very nature of the plan of mutual assessment insurance, it is proper for mutual benefit societies to provide that non-payment of an assessment within a specified time after notice, shall, *ipso facto*, work a forfeiture of the insurance, and an expulsion of the defaulting member. It is true, that where such stringent clauses of forfeiture are made in the contract, they are usually accompanied by provisions for the reinstatement of the delinquent member upon equitable terms, but such provisions are not necessary to the validity of the provisions of forfeiture. These societies depend exclusively upon the payment of assessments to meet their losses and expenses, and only by the prompt payment of assessments by their members can they maintain their solvency and responsibility. The only practical means which they have of enforcing payment of their assessments, is by forfeiting insurance contracts, and expelling the delinquent members for non-payment, and this power is necessary for the existence of such societies. To hold that specific notice to the member must be given of the time and place at which he will be called upon to answer the charge of having failed to pay his assessments within the stipulated time, and that a judicial act of the society, expelling the delinquent member, is necessary, in order to terminate his rights under the contract, and to hold further that such proceedings may not be waived by express contract of the parties, would be to extend unduly the period of insurance beyond the time for which a consideration had been paid, would offer encouragement to careless members, and greatly impair the ability of the societies to carry on the work for which they are organized.

§ **315. Same subject continued.** While it is competent for a member of a voluntary society to bind himself by an agreement that his membership and insurance shall be forfeited, in case he shall not pay his assessment within a stipulated time, and that such forfeiture shall take effect at the expiration of that time, without special or personal notice to him, and without any act on the part of the society, declaring the forfeiture, a construction leading to such a result will

a result will not be adopted by the courts unless the intention to waive such notice and judicial act, is clearly expressed in the most unambiguous and explicit language. As observed in The People v. The Medical Society of the County of Erie, 32 N. Y. 187, "the general policy of the law is opposed to sharp and summary judgment, where the party whose rights are in jeopardy has no opportunity to be heard in his own defense."

Where the charter of a society provides for strict forfeiture of membership and the benefits arising therefrom, upon the failure of a member to pay his dues or assessment, there is nothing to be done by the society, in order to give effect to the failure to pay them. While the conduct of the society may be such as to waive the forfeiture, the forfeiture takes effect unless it is waived.

§ **316. Same subject continued.** Under a law of a mutual benefit society, which makes the non-payment of assessments for a given period of time after notice, operate as an expulsion, *ipso facto*, of the delinquent member, and a forfeiture of his rights in the benefit fund, it is not necessary that the expulsion and forfeiture should be judicially determined by any judicatory of the society.

Where the by-laws of a society provide that each member shall, within thirty days after notification, pay the secretary the amount of the assessment, and that if any member shall neglect to pay any assessment within that time, "then and in such case such membership shall cease and determine at once without notice, and all claims be forfeited to the association," the neglect to pay an assessment for thirty days after notice thereof, *ipso facto*, determines the membership of the delinquent.[1]

The beneficiary of a member of a mutual benefit society, who, at the time of his death, stands suspended for non-payment of assessments by operation of the laws of the society, cannot recover on the benefit certificate on the ground that a subordinate lodge of the society, of which he was a member, had continued to treat him as a member, and to treat his unpaid dues to the supreme lodge as dues payable to the subordinate lodge for which it had extended him credit.[2]

[1] McDonald v. Ross-Lewin, 29 Hun (N. Y.) 87.

[2] Borgraefe v. Supreme Lodge etc. 22 Mo. App. 127. In this case, the dues payable to the supreme lodge, the mutual benefit society, were for insurance purposes, while those payable to the subordinate lodge were for local expenses; and the dues to the supreme lodge were not paid by the subordinate lodge for the deceased member.

Where the by-laws of a society provide that, in case of failure or neglect of a member to pay an assessment within a stipulated time, "his name shall be erased from the roll of members, and he shall forfeit all claims upon the association," and a member does not pay within the time limited, he at once ceases to be a member, and forfeits all claim upon the society by operation of the by-law.[1]

Where the laws of a society provide that, if a member neglects or refuses to pay an assessment within a specified time, he shall cease to be a member, and the secretary shall strike his name from the roll, such laws are self-executing, and the member so omitting to pay loses his right as a member, although the secretary does not strike his name from the roll.[2]

§ **317. Same subject continued.** The provision in the charter of a mutual benefit society, that "any member failing to pay his annual due or assessment within thirty days after notice has been served on him, or sent to him, shall forfeit his membership, and all benefits arising therefrom" is not self-executing in the sense that the failure to pay "is equivalent to a formal withdrawal or resignation at the expiration of the thirty days next after notice to pay an assessment," and a severance of all relations between the member and the society, which precludes a waiver of the forfeiture In such a case, the society may waive the forfeiture.[3]

Where a certificate of membership in a society, which provides for paying a certain sum of money on the death of a member, also requires the party to pay all assessments against him within ten days after notice thereof, or the certificate shall be null and void, and the by-laws of the society provide that a party failing to pay his assessments within ten days after notice shall forfeit his membership and all benefits therefrom, and the party, in his application for membership agreed to be bound by the rules and regulations of the society, a failure or neglect to pay an assessment, within ten days after notice of the same, will prevent any recovery upon the certificate after his death.[4]

Where a certificate of membership provides that the benefit

[1] Yoe v. Mut. Benevolent Ass'n. 63 Md. 86.

[2] Rood v. Railway Passenger, etc. Ben. Ass'n, 31 Fed. Rep. 62.

[3] American Mut. Aid Soc. v. Quire Ky.; 8 Ky. L. Rep. 101; Johnson v. The Southern Mutual etc. 79 Ky. 404.

[4] Benevolent Society v. Baldwin, 86 Ill. 479.

fund shall be paid to the beneficiary, in case of the member's death, on condition "that he has complied with the by-laws of the society," and the by-laws provide that members shall forfeit their membership if they fail to pay their assessments within thirty days after publication thereof; and where it appears from the evidence that the assured had failed to pay an assessment within the time specified, and that it remained unpaid at the time of his death, the assured has forfeited his membership, and the beneficiary cannot recover under his certificate.[1]

§ **318. Same subject continued.** In a certificate of membership in a mutual benefit society the member agreed "to make a deposit of twelve dollars, (two assessments), and renew the same when said deposit has been consumed, within thirty days from date of written notice, deposited in the post-office, in the City of New Orleans, State of Louisiana, addressed in conformity with his written address, filed with the secretary of the association." After the death of the member, an action was brought on the contract of insurance, and the testimony of the secretary and treasurer clearly established the fact that notices were sent through the post-office, according to terms of the agreement, informing the deceased member of the consumption of his deposit, and calling on him to renew the same; and that the member failed to renew the deposit, within thirty days from date of written notice, etc. Upon these facts the court held that the failure to renew the deposit, in accordance with the contract, forfeited the "good standing" of the member in the society, and constituted a sufficient defense to the action.[2]

§ **319. Same subject continued.** In McMurray v. Supreme Lodge, etc., 20 Fed. Rep. 107, it was held that "good standing" within the meaning of the laws of the Knights of Honor, implies a full and fair compliance with those laws, in the payment of assessments and dues; that a member who is largely in arrears for assessments and dues, is not "in good standing," within the meaning of his benefit certificate, and if he die, when so in arrears, his beneficiary is not entitled to the payment of the benefit.

Decision No. 20, made by the supreme dictator of the Knights of Honor in 1879, held that, if a member fails to pay an assessment, within thirty days allowed by the constitution,

[1] Madeira v. Merchants' etc. Ben. Soc., 16 Fed. Rep. 749.

[2] Zeigler v. Mutual Aid & Ben. Life Ins. Co., 1 McGloin (La.) 284.

and dies between the expiration of the thirty day and the next meeting of the lodge, his family or heirs would be entitled to the death benefit; that a member must be suspended in order to forfeit his death benefit, and cannot be suspended after his death. In McMurray v. Supreme Lodge, etc. *supra*, the court held that this decision did not apply where the death of the delinquent member took place after the next meeting of his lodge; that the assured, having been in arrears for eight assessments at the time of his death, was not in good standing, and that his beneficiary could not recover.

This decision seems to be contrary to the principles governing the forfeiture of rights of membership. According to the decided weight of authority, some act of the society, judicially declaring the forfeiture was necessary under the contract. The contract provides, as such contracts usually do, that certain benefits will be paid to the beneficiary of the member, "providing he is in good standing when he dies." The laws of the order contain the following provisions upon the payment of dues, assessments, etc:

"Any member who may become in arrears for dues or fines to this lodge shall not be entitled to vote, hold office, nor shall he be entitled to benefits; and when six months in arrears for dues or fines, or when he fails to comply with section 3 of law XV., he shall be suspended from the lodge."

Law XV., Sec. 3. "Each member shall pay the amount due, on the notice of the reporter of his lodge, within thirty days from the date of such notice, and any member failing to pay such assessment within thirty days, shall be suspended from his lodge."

Under the authorities cited in the preceding paragraphs,[1] notice to the member, and a declaration of forfeiture for the non-payment of assessments were necessary to terminate the "good standing" of a delinquent member.

§ **320. Same subject continued.** Whether the effect given to the by-laws in the McMurray case, arises from a correct, or an incorrect construction, it is evident that there are two lines of authorities upon the construction to be given to provisions of forfeiture of "good standing" in mutual benefit societies; on the one hand, the cases of The Illinois Masons' Benevolent Society v. Baldwin, 86 Ill. 479; Madeira v. Merchant's etc., Ben. Society, 16 Fed. Rep. 749; McMurray v.

[1] Sections 307 to 313 inclusive.

Supreme Lodge, etc., 20 Fed. Rep. 107 and Ziegler v. Mutual Aid & Ben. etc. Ass'n., 1 McGloin (La.) 284, and on the other hand, the cases cited in the preceding paragraphs; the latter cases holding that some formal declaration of forfeiture on the part of the society is necessary to terminate the rights of the member, and the former holding that such declaration is not necessary.

§ 321. Restoration after suspension or forfeiture. When a society is composed of one grand or central body, and many subordinate and local councils or lodges, these local organizations must, for most purposes, be regarded as the representatives and agents of the society, not of the members insured by it. And although a local council is bound to conform all its proceedings to the requirements of the constitution and by-laws of the society, yet the insured member is not to be held responsible for such irregularities of proceeding, as the local council may commit in adjudicating or determining upon his rights under the contract of insurance.

When a local council is authorized by the constitution and by-laws of a society, to receive and pass upon applications for restoration or re-admission to membership in the society, and when, acting upon such authority, such council does consider and adjudicate upon an application for restoration or re-admission, restores or re-admits the applicant, and afterwards supplements this action by renewing its calls upon the restored or re-admitted member for assessment, and by accepting such assessments, these acts of the society constitute an estoppel, prohibiting the society from denying the legality of the member's restoration or re-admission, and subjection to new assessments.

It cannot with plausibility or any degree of liberality be contended that the local council of the society is bound, at the peril of a member who has been suspended, or who has forfeited his membership, to conduct its proceedings for his restoration or re-admission strictly in accordance with the manner prescribed in the constitution and by-laws of the society; that if it fail strictly to observe the routine thus prescribed, the suspended or dropped member is responsible for the irregularity; and that, if the local council varies at all, in its proceedings for restoration or readmission, from the details of procedure set forth in the constitution and by-laws, then, the restoration or readmission shall be null and void.[1]

[1] Hoffman v. Supreme Council, 35 Fed. Rep. 252; 2 Herman on Estoppel, Sec. 1214 and cases cited.

§ 322. **Restoration continued.** By the rules of a society, if a member fail to pay his assessment on or before the tenth day of the following month after notice, he shall stand suspended from all rights and privileges in the society from that time. He may, however, within three months, make application in writing signed by him, for restoration, to be presented at a meeting of his lodge, accompanied by a sum equal to all his dues and assessments, and be restored by a majority vote of the members of his lodge present at such meeting.

A member was in default for not paying two assessments on or before August 10, 1885, and he was suspended by his lodge on August 15, and so reported to the grand lodge of the society. On Sept. 5, his lodge passed a resolution that he be restored on payment of the dues and assessments charged against him. On Sept. 20, he caused the full amount of his dues and assessments up to that date to be paid to his lodge, and died on the following day. The society refused to pay the fund to his beneficiary, because he had not presented to his lodge an application in writing signed by him, etc.

In passing upon this question the Supreme Court of New York says: "This (the formality prescribed) has relation only to the manner of bringing his case before the meeting of the lodge. Its purpose evidently is to require action to be taken. Without such application the duty would not be imposed upon it to act in the matter. But the lodge, having the power to restore him to his relation of member, might, it would seem, do it without the formality of a written application, as it would contain nothing essentially relating to the inquiry whether or not he should be reinstated. It may be that the subordinate lodge may not waive the observance of any regulation of the grand lodge, which in its nature or effect is substantial. But those things which are merely formal and incidental to the exercise of the power vested in the subordinate lodge may not require strict observance to render its action effectual. To that extent waiver is incident to the exercise of power possessed in support of action taken." The court held that, upon complying with the requirements of the resolution of the lodge, the member became again entitled to the enjoyment of all his rights, as such, and that, upon his death, his beneficiary was entitled to the fund.[1]

[1] Gaige v. Grand Lodge, 15 N. Y. St. Reporter, 455.

§ 323. Restoration continued. The by-laws of a mutual benefit society provided that a member who should fail to pay an assessment, should be suspended, but that a payment within three months should reinstate him. Another article of the by-laws provided for the action of the society in cases where members delinquent for more than three months should desire to pay arrearages, and obtain restoration of their rights. A member delinquent for less than three months, paid an assessment while on his death bed, and it was held that his rights were thus restored without action on the part of the society.[1]

The constitution of a society provided for the reinstatement of a member who had been suspended for non-payment of an assessment, on his making a written application, and on his paying arrears of dues and assessments, if a majority of the ballots cast on the vote to be taken by the members of his lodge on the question, were in favor of his reinstatement.

After default and suspension the insured paid his assessment, but the collector received it under protest. The formal paper requesting reinstatement was demanded of him, and no vote was taken by his lodge. The supreme secretary wrote him that his lodge could not reinstate him without a medical examination, and, on this letter, his name was dropped from the membership. It was held that the ruling of the supreme secretary was not in accordance with the laws of the society, and that the suspended member had been deprived of a right to a ballot, and to reinstatement, without good cause.[2] This condition in respect to good health was not in the rule, and the officers had no right to add it to the rule.[3]

§ 324. Restoration continued. A member is in good standing in a mutual benefit society so long as he faithfully performs his duty as a member of the society and regularly pays or tenders his dues and assessments. The society cannot deprive him of any rights by wrongfully refusing to accept dues and assessments tendered by him under the contract of insurance.

A member of a subordinate court of the supreme court of the Independent Order of Foresters was insured, under the endowment provisions thereof, for $1,000. This court left the order in a body, and was consequently suspended. By the

[1] Manson v. Grand Lodge, 30 Minn. 509.

[2] Ingram v. Supreme Council, 14 N. Y. St. Reporter 600.

[3] Dennis v. Benefit Association. 14 N. Y. St. Reporter 605; See also Van Houten v. Pine 38 N. J. Eq. 72.

rules of the order members of suspended courts, in good standing at suspension were, on application within thirty days to the supreme secretary, and payment of a fee of $1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but, if after thirty days, they must pass a medical examination. The member, ascertaining that his court had been suspended from the order, and being then in good standing, applied, within thirty days, to the supreme secretary of the order for his card of membership, tendering $1. and assessments due, which were refused on the ground that a medical certificate was necessary. The member, by reason of his not having the card, was prevented from affiliating with another court, though he endeavored to do so. He regularly tendered his monthly assessments until he died. It was held, on these facts, that he died in good standing, and that his beneficiary was entitled to the benefit fund.[1]

§ 325. **Restoration continued.** The widow of a deceased member sued a mutual benefit society for the benefit fund. It was proved in defense that the member had been regularly suspended for non-payment of assessments; that the by-laws of the society required that a member so suspended should be reinstated within six months, provided he appeared in person, or applied in writing, and paid up all dues to date of re-admission; that within said time deceased had sent the money to pay up his dues, but that it had not been accepted by defendant, and that deceased had never appeared in person, or applied in writing for his reinstatement as a member. It was held that the defense was sufficient. The society was not obliged to accept the money sent by the member as long as he did not appear in person, or apply in writing. He was required to do one or the other, in addition to the payment of his dues, to terminate his suspension and secure his re-admission. The court had no power to relieve the member from the observance of this condition, and his suspension, therefore, continued to the period of his decease, and necessarily forfeited all his rights and privileges as a member of the society, except that of being reinstated upon complying with the by-laws. The membership of the deceased was subject to the operation and effect of the by-laws of the society, and as they were reasonable, it was the duty of the court to protect the corporation in enforcing them.[2]

[1] Oates v. Supreme Court of Foresters, 4 Ontario 535.

[2] Lehman v. I. O. B'nai Brith, 23 N. Y. Weekly Dig. 409.

ASSESSMENTS.—Part III.

SEC. 326. } Excuse for non-payment—custom of society.
SEC. 328.
SEC. 329. Excuse for non-payment—sickness or insanity—act of God.
SEC. 330 Excuse for non-payment—Sunday, Thanksgiving day.
SEC. 331. } Excuse for non-payment—statements and agreements of officers of society.
SEC. 332.
SEC. 333. Excuse for non-payment, set-off.
SEC. 334. Recovery of assessments paid by member.
SEC. 335. } Assessments retained by society—waiver of forfeiture.
SEC. 341.
SEC. 342. } Receipt of assessments—estoppel *in pais*.
SEC. 343.
SEC. 344. Effect of return of assessment once paid.
SEC. 345. } Attempt to collect assessments—waiver of forfeiture.
SEC. 348.
SEC. 349. Promise of society to receive past due assessments.
SEC. 350. Effect of levy of assessment to pay death loss.

§ 326. Excuse for non-payment—Custom of society. While it is sometimes said that custom is never permitted to overcome the express terms of a contract, yet a custom may change the express provisions of a contract, where it has the necessary elements of an estoppel. If a society continually waives a forfeiture, and this fact is known to the public and to the member, it is bound by the custom in that regard. Such a custom must be clearly established, and its uniformity and duration shown. Isolated instances of waiver of forfeiture are insufficient to prove a custom, and cannot be shown to overcome or change the express provisions of the contract of insurance.[1]

Knowledge of the custom, upon the part of the member, must be shown in order to be binding upon the society.

The by-laws of an association provided for payment of assessments within thirty days after proper notice, and, in default thereof, for forfeiture of rights of membership. A member failed to pay an assessment and died. In a suit on

[1] Willcut v. N. W. Mutual, etc., 81 Ind. 301; Crossman Adm'x. v. Mass. Ben., etc., Mass. 9 N. E. Rep. 753; Ill. Masons Benevolent Soc. v. Baldwin, 86 Ill. 479.

the certificate of membership, it was shown that it was the custom of the association, if a member failed to pay his assessment after one notice, to give him a second one, requiring him to pay within ten days, and that the deceased member had not been given a second notice. The evidence did not establish any knowledge of such a custom upon the part of the deceased, and was held insufficient.[1]

§ **327. Custom continued.** In a suit upon a certificate of insurance, it was held that, even though a custom of leniency to its members, in receiving assessments after the stipulated time, were thoroughly established, there was nothing in such a custom as would prohibit either an inquiry by the society as to the health of the member who desired to take advantage of the custom, or the refusal of the money when tendered, if the health of the applicant was so impaired as to increase the risk.[2] But in Stylow v. Wisconsin Odd Fellows, etc., Wis., 34 N. W. Rep. 151, the opposite conclusion was reached by the court. In that case, the by-laws of the society provided that membership should be forfeited by failure to pay an assessment within sixty days after notice, but that re-instatement might be had, the company reserving the right to exact a physician's certificate of good health.

In an action on the certificate issued by the society, it was shown that, at the death of the member holding the certificate, sixty-seven assessments had been made against him. Of these the last three had not been paid—Nos. 17, 18 and 19. The evidence disclosed the fact that the society made assessment No. 19 against the deceased two days after he was in default for assessment No. 17, for the non-payment of which the society claimed he forfeited all rights under his contract with the society. Of the remaining sixty-four but one assessment had been paid within the sixty days, and all payments had been received without demand for a physician's certificate, though some payments were made one hundred days late. The court, in this case, says: "The assured had every reason to believe that the company would accept the payment of these assessments as it had accepted the payment of all others, within a reasonable time after they became due, without making any question as to his state of health. * * * * We are of opinion that

[1] Jones *et al.* v. Nat., etc., Ky. 2 S. W. Rep 447; Schwarz v. Germania L. Ins. Co., 18 Minn. 448; Adams v. Otterback, 15 How. 539; Taylor v. Ætna L. Ins. Co., 13 Gray 434.

[2] National Mut., etc., v. Miller, Ky., 2 S. W. Rep. 900; see also Lewis v. Phoenix Mut., etc., 44 Conn. 72.

after the constant course of conduct of the company with the assured, as shown by the evidence in this case, the only way the company could insist upon a forfeiture for non-payment within the time fixed by the by-laws would be by giving the assured personal notice that thereafter punctual payment would be required." [1]

§ 328. Custom continued. Where the uniform custom of the society has been to give notice of the time when assessments fall due, and to collect the same at the residence of the member through a local agent residing in his neighborhood, good faith requires that this mode of collecting should not be discontinued, and payment required at the society's office, without notice to the insured.[2]

But it has been held that where the exact time of payment is fixed by the contract, and the society has been accustomed to notify the insured in advance of that date, and to urge him to be punctual, it may, nevertheless, cease to give such notice at any time, without informing him that such notice will no longer be given [3]

If the practice of a society and its course of dealing with its members, known to the insured, have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event, will not be insisted on, the society will not be permitted to set up such forfeiture, as against one in whom their conduct has induced such belief.[4]

It is a well settled and salutary rule of law, that a party cannot insist upon a condition precedent, when its non-performance has been caused by himself.[5]

In Helme v. Phila. Life Ins. Co., 61 Pa. St. 107, plaintiff offered on the trial to prove a custom among life insurance companies, to allow thirty days of grace for payment of premiums, even where a clause of forfeiture for non-payment on a time certain existed, and the court held that the testimony

[1] See Insurance Co. v. Hinesley, 75 Ind. 1.

[2] Ins. Co. v. Bernard, 33 Ohio St. 459; Seamans v. N. W. Mut. Life, 3 Fed. Rep. 325; Hanley v. Life Ass'n. etc., 69 Mo. 380; Illinois Ins. Co. v. Stanton, 57 Ill. 354; Bouton v. Mut. Life, etc., 25 Conn. 542; White v Conn. Ins. Co., 120 Mass. 330; Meyer v. Knickerbocker Life, etc., 51 How. 267.

[3] Thompson v. Insurance Co. 104 U. S 252; Mutual Fire Ins. Co. v. Miller, 58 Md. 463; Mandego v Life Association, 64 Iowa 134, distinguishing Phœnix Mut. v. Doster, 106 U. S. 30.

[4] Ins. Co. v. McCain, 96 U. S. 84; Ins. Co. v. Wolff, 95 U. S. 326; Ins. Co. v. Eggleston, 96 U. S. 572; Ins. Co. v. Pierce, 75 Ill. 426; Bradwell v. Ins. Co., 75 N. C. 8; Thompson v. Ins. Co., 52 Mo. 469.

[5] Young v. Hunter, 6 N. Y. 207.

should have been admitted.[1] The contrary doctrine has been held in several cases.[2]

A condition in the contract of insurance issued by a mutual benefit society, providing that a failure to comply with the rules of the society as to payments shall render the certificate void, is not waived, as to future payments, by the fact that the officers have reinstated the insured member when he has failed to make payment according to the rules of the society; especially when another rule, which is a part of the contract, permits the officers to so reinstate a member, on payment of arrears, for any valid reason.[3]

§ 329. Excuse for non-payment,—insanity, act of God. Where there is no provision of the contract of insurance, which declares, either expressly, or by necessary implication, that sickness, insanity or similar incapacity shall excuse the non-payment of a premium on the day it is due, the courts cannot grant relief against such contingencies.[4]

The case of Hillyard v. Mutual Benefit Life Insurance Company, 25 N. J. Law 415, holds that a failure to pay a premium on the day fixed may be excused, if the failure occurred through no fault of the insured, but by the act of the law, or the act of God. But this doctrine is not in harmony with the adjudicated cases upon this subject.[5]

It is a general rule that sickness, insanity, or similar incapacity on the part of the member will not excuse the non-payment of an assessment within the stipulated time.[6] But the charter, constitution, by-laws, or certificate of membership may contain provisions qualifying this rule, although not stating the qualification in express language. Thus, a rule of a society, creating the annulment of the contract of insurance for non-payment of an assessment, also provided that "for valid reasons to the officers of the association (such as a failure to receive notice of an assessment) he (the default-

[1] Ruse v. Mut. Ben. etc. 26 Barb. (N. Y.) 556; 24 N. Y. 653; Mayers v. Mutual etc. Ins. Co. 38 Iowa 304.

[2] Mutual Benefit etc. v. Ruse, 8 Ga. 534; Ins. Co. v. Sefton, 53 Ind. 380; Lewis v. Phœnix Mutual etc., 44 Conn. 72.

[3] Crossman v. Benefit Association, Mass.; 9 N. E. Rep. 753.

[4] Klein v. Insurance Co., 104 U. S. 88; Thompson v. Insurance Co., 104 U. S. 252; Wheeler v. Insurance Co., 82 N. Y. 543; 16 Hun (N. Y.) 317.

[5] See Bliss on Life Insurance at section 179; See also Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276.

[6] Hawkshaw v. Supreme Lodge, 29 Fed. Rep. 770; Yoe v. Benevolent Association, 63 Md. 86; Ingram v Supreme Council, 14 N. Y. St. Reporter 600.

ing member) may be reinstated by paying the amount of arrearages." On February 12, 1886, the deceased received notice of an assessment; and on March 8, 1886, he was stricken with apoplexy and died, without having paid it.

The Supreme Court of New York held that his sudden illness did not excuse the non-performance of the condition of the contract; but further held, Dykman J. dissenting, that, by reason of the rule of the society, allowing reinstatement for valid reasons, it was a question of fact for the jury, whether the excuse was sufficient, and that the right of the decedent to have that question determined by a jury, passed to his beneficiary upon his death.[1]

§ 330. Excuse for non-payment — Sunday, Thanksgiving day. A contract of insurance provided: "This policy will not be considered in force if the premium remains unpaid beyond thirty days after becoming due." The thirty days expired on Sunday and the premium was tendered on Monday. The court held that the tender was made in time and says: "The court is warranted in saying, that when from accident or mutual error, the day of fulfilling an agreement falls upon Sunday, there is enough of principle and authority to justify the party in deferring his performance to the Monday ensuing, without impairing a right or incurring a forfeiture."[2]

A statute of Kentucky provides that Thanksgiving day shall be treated as Sunday, as to the presentment, acceptance and protesting of notes and bills. The court of appeals of that state held that this statute did not apply to other business transactions and contracts, and that the payment of an assessment should be made on Thanksgiving day, if so contracted, notwithstanding the statute.[3]

The statutes of the different states must be consulted in order to determine whether Thanksgiving day is such a legal holiday as will excuse the non-performance of a contract to pay an assessment falling due on that day.

§ 331. Excuse for non-payment—statements and agreements of officers of the society. A director of a society called upon a sick member who was insured in the society. The sick member said to him that an

[1] Dennis v. Benefit Association, (N. Y. Sup. Ct.) 14 N. Y. St. Reporter 605.

[2] Campbell v. International Life etc. 4 Bosw. 298.

[3] National Mutual Ben. Ass'n. v. Miller, Ky. 2 S. W. Rep. 900.

assessment was due on the following Friday, that he could send out and borrow the money to pay it, but that he expected some money on the following Monday, and did not like to borrow it. He asked the director to pay the assessment for him, promising to repay him on the following Monday. The director assured him that he would pay it for him at once, but neglected to do so, and the society claimed that his rights were forfeited. The court held that the promise of the director was one upon which the member had a right to rely, and that the member should be reinstated. [1]

The statement of the secretary of a mutual benefit society to the insured member, that he need not pay his dues until certain charges then pending against him, which, if true, made the policy forfeitable, were disposed of, is one upon which the insured has a right to rely, and will excuse the non-payment of assessments until that time.[2]

The by-laws of an unincorporated mutual benefit society provided that, in case a member, for failure to pay an assessment promptly, had been dropped from the society by the secretary, the board of directors should have power to reinstate him on his presenting to them a reasonable excuse for such failure, and paying the sum in arrears. A member, being delinquent, appeared before them, and offered a sufficient reason for his delinquency, and the board refused to reinstate him because they alleged his health was precarious. He died very soon afterward. The court, after his death, inquired into and determined the adequacy of the reason so offered, and compelled the society to pay the amount of insurance to which such delinquent's widow was entitled.[3]

§ 332. **Same subject continued.** Where the officers of a society circulate a pamphlet among its members, stating that thirty days grace will be given for the payment of dues and assessments, the society is estopped to claim a forfeiture on account of the failure to pay on the day stipulated,

[1] Van Houton v. Pine, 9 Stew. Eq. 133; 38 N. J. Eq. 72.

[2] Jones v. National Mutual etc. Ky.; 2 S. W. Rep. 447; Robertson v. Metropolitan L. Ins. Co., 47 N. Y. Superior Ct. 377.

[3] Van Houten v. Pine, 38 N. J. Eq. 72; 9 Stew. Eq. 133. The excuse was that a director of the society had promised and assured the member that he himself would pay the assessment due the next Friday, in consideration of the promise of the member to repay him the amount of such assessment on the Monday following.

where the member relies upon such statement, and fails to pay promptly.[1]

Where a member of a mutual benefit society, relying on the promise of its manager to draw on him for assessments, and, being misled by the fact that such drafts had been twice made on him, is suspended because of non-payment of an assessment for which no draft was made, and is unable to be re-instated for the reason that his health has become impaired, the society is estopped from insisting upon a forfeiture.[2]

A person having notice that an agent with whom he is dealing is acting beyond the scope of his authority, cannot hold the principal. The promise of an agent of a mutual benefit society to a member whom he owes, that he will pay such assessment as may be made by the society and become debtor therefor to the society, is of itself notice that the agent is acting outside of his authority; and the society is not bound to accept the agent instead of the member as his debtor, unless it, with full knowledge of what the agent has done, affirms or ratifies it.[3]

§ 333. Excuse for non-payment—Set-off. It is not a valid excuse, on the part of a member, for a neglect to pay an assessment, that the society owes him a less sum, if he does not offer to pay the remainder.[4]

§ 334. Recovery of assessment paid by member. The provisions of a life-insurance policy are construed and applied like the terms of any other contract, and such provisions may render the policy void *ab initio*. The risk may never have attached, by reason of misrepresentations, or breach of warranty of the assured, without fraud on his part. In such cases, he may recover back all the premiums he may have paid. But when the risk has attached, premiums paid during the continuance of the policy cannot be recovered.[5]

These principles are applicable to assessments in mutual benefit societies.[6]

Where the charter of a mutual benefit society provides that

[1] Fowler v. Metropolitan L. Ins. Co., 41 Hun. 357; Ruse v. Mutual, etc., Co., 24 N. Y. 653; Howell v. Knickerbocker, etc., Co., 44 N. Y. 276

[2] McCorkle v. Texas Ben. Ass'n, Texas. 8 S.W. Rep. 516.

[3] Co-operative Association v. McConnico, 53 Miss. 233.

[4] Hollister v. Quincy Ins. Co., 118 Mass. 478.

[5] May on Insurance at section 567; Bliss on Life Insurance at section 415

[6] Matt *et al.* v. Roman Catholic Mut., etc., 30 N. W. Rep. 799; Gray v. National Ben Ass'n, 111 Ind. 531; 11 N. E. Rep. 477; see section 306.

the benefit fund shall, upon the death of a member, be paid to his widow and children, they are entitled to the fund, although another person is named in the certificate of membership as the beneficiary, and has paid all the assessments upon the certificate. The certificate must be construed in connection with the charter as a contract to pay to the widow and children of the member the amount of the insurance. If a certificate in such a society is made payable to a creditor of the member, it is not void, but is an existing contract in favor of the member's wife and children. As it is not void, the creditor cannot recover of the society the amount of the assessments which he has paid to it, in consideration of the insurance. Upon the death of the member, however, he is entitled to have restored to him all that he has expended for the benefit of the beneficiaries named in the charter.[1]

§ **334a.** Where the provisions of an act for a relief fund by contributions from the members of an order, such as a police force, cannot be carried into effect without compulsory contributions, and the courts decide that such contributions are not compulsory under the act, payments made before the decision, under the belief that they were compulsory, or unwillingly and under protest, should be refunded; the object of the act having failed, no benefit under the act was acquired pending the decision.[2]

§ 335. Assessments retained by society, waiver of forfeiture. A society may not retain the assessment paid before the death of a member, and refuse to pay the insurance to the beneficiary of the certificate, on the ground that it was not paid within the time stipulated in the contract.[3]

Where, in an action upon a contract of insurance, it is shown that the society knew for eighteen months after proof of death that the deceased member had misrepresented his age in his application for membership, but had never at any time offered to rescind or cancel the contract sued on, or to refund the money it had received thereon, it will be held to have ratified and confirmed the contract, and is estopped from asserting the misrepresentation as a defense to the action.[4]

[1] Gibson v. Ky. Grangers' Mut. Ben. Society, 8 Ky. L. Rep. (Sup'r, Ct.) 520; Ky. Grangers' Mut. Ben. Soc. v. McGregor, 7 Ky. L. Rep. (Sup'r Ct.) 750.

[2] Murray v. Buckley, 1 N. Y. Supplement, 247.

[3] Underwood v. Iowa Legion of Honor, 66 Iowa 134.

[4] Gray v. National Ben. Ass'n, 111 Ind. 531; 11 N. E. Rep. 477.

Where a member of a mutual benefit society fails to pay his assessments during a certain year, and the society, not discovering such failure, demands and receives subsequent assessments, and retains them until after the death of the member, the society will be held to have waived the forfeiture for non-payment, and is liable for the amount due on the certificate.[1]

Assessments may be retained by the society in such a manner, and under such circumstances, as to constitute an act of affirmance of the contract of insurance after, as well as before, the death of the member whose life was insured.[2]

A society, after demanding, receiving and retaining, until after the death of a member, the amount of an assessment due from him, cannot claim that the money was demanded and received by mistake, and that the certificate is forfeited.[3]

The right to a certain benefit fund was forfeited, in case the assured, at his death, had not paid all assessments against him, but, after his death, all assessments against him were paid for him in pursuance of authority granted and a request made during his life time, and were by his local lodge, which was defendant's agent in the collection of assessments, received and forwarded to defendant, and by it accepted and retained until after commencement of a suit for the benefit fund. These assessments were accepted and retained with knowledge, on the part of both the local lodge and the defendant corporation, of the death of the assured, and the court held that the forfeiture for non-payment in the life time of the assured had been waived, and that the defendant corporation was liable.[4]

In Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111, it was held, that an acceptance by the insurer of part of the premium on a fire insurance policy, with knowledge that the property had been destroyed, was a waiver. In the opinion, the court alludes to the peculiar terms of the contract; but the waiver is put distinctly and clearly on the ground that, as the company had accepted the cash premium after the default, and notice of loss, this operated as a waiver of the suspension clause in the policy.

[1] Tobin v. Western Mut. Aid Soc. Iowa 33 N. W. Rep. 663; Roswell v. Equitable Aid Union, 13 Fed. Rep. 840.

[2] Masonic Mutual etc. v. Beck, 77 Ind. 203; Joliffe v. Madison Mutual 23 etc., 39 Wis 111; Grand Lodge v. Cohn, 20 Ill. App. 335; Erdmann v. Mutual Ins. Co. etc. 44 Wis. 376;

[3] Bailey *et al.* v. Mut. Ben. Ass'n. Iowa, 27 N. W. Rep. 770.

[4] Erdmann v. Mut. Ins. Co. of Order of Herman's Sons, 44 Wis. 376. See § 303.

§ 336. Same subject continued. In a case of mutual fire insurance, it was held that where a society imposes a forfeiture of the contract, in case of loss while its assessment is unpaid, but its local agent receives the past due assessment with knowledge of a loss, and forwards it to the society without notifying its officers of the facts; and the officers receive the assessment, and, two or three weeks afterward, order the loss to be paid when adjusted, they cannot afterward refuse payment on the ground of the delay in paying the assessment, since they have waived that by receiving it when overdue, and ordering payment.[1]

Whether assessments have been retained an unreasonable length of time, and under such circumstances as to waive a forfeiture, is a question for the jury to determine. In the absence of evidence showing that an administrator of a deceased member had been appointed and qualified to receive payment of assessments paid by the deceased, and that the society retained such assessments for an unreasonable time after such appointment of an administrator, and after learning the facts on which it claims the policy to be void, the forfeiture cannot be held to be waived.[2]

A certificate of membership in a mutual benefit society was subject to a by-law providing that, if any assessment was not paid within thirty days after notice, the certificate should be forfeited. Several assessments were permitted to remain unpaid long after the thirty days, and on the day of the member's death, the person to whom the notice of assessment had been sent called on the local agent of the society, and offered to pay the amount of such assessments. The agent, who had no authority to make arrangements in regard to the standing of members, agreed to accept the money, and forward it to the society, whose office was twenty-eight miles distant, subject to its action in the matter. In his report he said: "If money is not received, must be refunded." About ten days afterward, the society gave notice, through the agent, that the payment would not be accepted, and offered to return the money. It was held that the court did not err in leaving it to the jury to say whether the delay in refusing the money amounted to a waiver of the forfeiture.[3]

[1] Farmers' Mutual, etc. v. Bowen, 40 Mich. 147.

[2] Matt v. Roman Catholic Protective Society, Iowa, 30 N. W. Rep. 799.

[3] United Brethern Mut. Aid Soc. v. Schwartz, Pa. St. 13 Atl. Rep. 769

§ 337. **Same subject continued.** Where a member of a mutual benefit society failed to meet the assessments made upon him, but subsequently transmitted to the secretary thereof an amount of money, in payment of all dues that had been demanded of him, which sum the society retained for four months, and until after his death, without notifying him whether the payment was satisfactory or not, such retention of the amount by the society was a waiver of the default, and restored him to membership.[1]

Where the society retains, and continues to collect assessments, after its secretary has knowledge of a false statement in the application, as to the age of the member insured, the society waives the forfeiture of the insurance contract.[2]

Where payment of an assessment on a certificate of membership was accepted by the society, after the time limited in the contract of insurance for making such payment had expired, and a receipt was given therefor, stamped across its face with the words "Received on condition that member is in good health," but nothing was said by the member as to his health after he had received the receipt, and no inquiries relative to the condition of his health were made then, or subsequently, by the society, the subsequent levy and unconditional acceptance by the society of assessments on the member, operated as a waiver of the forfeiture, although the member was, at the time of the conditional acceptance, in ill health. In deciding this question, the court said: "Without expressing any opinion as to the effect of the retention of that money (the assessment which was paid after it was due), we think the levy of the subsequent assessments, and the acceptance of the money paid upon them, amounted to such a waiver. When the time came for the levy of a new assessment, if Mr. Rice's policy was to be treated as still in force, he would properly be included in the assessment; otherwise not. Under this state of things, six other assessments upon him were made by the company; all of which were seasonably paid. There was no determination by the directors of the company that, for the time being, Mr. Rice's policy should be treated as not in force or suspended, but in making new assessments, so far as appears, no pains were taken, and no intention was formed, to exclude him. No condition was in express terms annexed to the levy of these new assessments, or to the acceptance of the payments of the

[1] Georgia Masonic Mutual v. Gibson, 52 Ga. 640.

[2] Morrison v. Odd Fellows etc., 59 Wis. 162.

assured upon them. The company, however, contends that the condition of the former acceptance reaches forward, and applies also to the later payments; and that it is not bound by later assessments which it made, and later payments which it received in ignorance that the assured was in ill health at the time of the former payment. But it cannot be allowed in this way to imply a condition in favor of a forfeiture. It had knowledge that on the former occasion the payment had been made too late, and that the money had been accepted with a condition annexed. If, before levying a new assessment, the company wished to know the particulars as to Mr. Rice's health, and thus to determine whether that payment was valid or not, it was incumbent on it to make inquiry. Instead of doing so; instead of notifying him that it wished for some positive evidence or statement upon the subject; instead of imposing a further condition, relating back to the time of the former payment, the company made an unconditional call upon him for the payment of the new assessment. It acted under no deception or misrepresentation, but with all the information which it cared to take the pains to acquire. We are unable to see how it can properly be held that the former conditional acceptance cuts down the effect of the later unconditional acceptance. The condition related to the former payment alone. Suppose the payment of the former assessment had never been made at all; and the company, without insisting upon the non-payment as a ground of forfeiture, had levied new assessments upon the assured, which were all duly paid and accepted without condition; could it be contended that there was no waiver? An unconditional acceptance of an assessment waives all the former known grounds of forfeiture; and this effect is not varied or limited because an acceptance of a former assessment had been on condition, and had not amounted to such a waiver."[1]

§ 338. **Same subject continued.** A member of a society forfeited his certificate by failing to pay an assessment due December 7, 1882, when the secretary of the society wrote him, in substance, that if he would send in the assessment immediately, he would send a receipt without default. The assessment was not then paid, but on the 25th of that month

[1] Rice v. New England Mutual Aid Soc. Mass.; N. E. Rep. 624; citing upon the last proposition; Hodgdon v. Insurance Co., 97 Mass. 144; Bonton v. Insurance Co., 25 Conn. 542; Insurance Co. v. Raddin, 120 U. S. 183.

the member was taken sick, and on the 31st of the month he died. On the 30th, however, at his request, his wife, who was the beneficiary of his certificate, remitted the money, and it was received, at the society's office, January 1st. Receipts for the assessment were returned in printed form, each containing the provisions that it should be valid only on condition that the assured be alive and in good health, on the date of its date; but there was written, in the handwriting of the secretary, on the margin of each receipt the words "no default." After the society was informed of the death of the assured, it returned the money to the widow. It was held, upon these facts, that because the remittance was not made immediately upon receipt of the letter of December 7th, the offer therein contained to waive the default, was at an end; that, since the assured was not alive at the date of the receipts, they were invalid by their own terms. The written words "no default," not being repugnant to the printed conditions of the receipts, they must be construed in connection with such conditions; and the true meaning is that there should be no default provided the assured was alive and in good health at the time of their date.[1]

§ 339. **Same subject continued.** When no fraud has been practiced by the insured, in concealing his state of health at the time the payments are made, and the society receives such payments out of time, when it might refuse payment, and declare the insurance forfeited, it cannot accept the money and keep it, and still insist upon a forfeiture; and where a receipt for an assessment has appended to it the following: "It is hereby understood that in case the assured is not in good health, this receipt shall not be binding, unless the money be paid to the secretary or local agent on or before sixty days from date of notice of assessment," the case is not altered.[2]

Every time the company makes an assessment against the assured, after he has failed to pay a previous assessment within the time prescribed by the rules, it waives the forfeiture of the policy for such failure to pay, and admits him to be a member of the company, notwithstanding such failure.[3]

[1] Servoss v. The Western Mutual Aid Society, 67 Iowa 86.

[2] Stylow v. Wisconsin Odd Fellows, Wis., 34 N. W. Rep. 141; see also Bucklee v. U. S. Ins., etc., 18 Barb. (N. Y.) 541.

[3] Nat. Mut. Ben., etc., v. Jones, Ky., April 1886; Stylow v. Wisconsin Odd Fellows, Wis. 34 N.W. Rep. 151.

The society has a right to declare the contract forfeited if the assessment is not paid within the stipulated time, but this forfeiture is for the benefit of the association, and the levy of an assessment upon a delinquent member is a clear recognition of the validity of the policy, and an acknowledgment of his rights as a member.

The demand and receipt of assessments by a society, made with full knowledge of the facts, is a distinct act of affirmance of the contract by the party entitled to avoid it, and will constitute a waiver of the right to annul the contract.[1]

§ 340. **Same subject.** But after a policy has been forfeited, it cannot be renewed except by express agreement. A waiver never occurs unless intended, or unless the act relied on ought in equity to estop the party from denying it. After a policy of insurance had been declared forfeited for violation of by-laws, and notice of such forfeiture had been given to the assured, the company passed a resolution directing an assessment on all policies "in force at this date," and the treasurer assessed the forfeited policy by mistake. The assured paid the assessment, and claimed a waiver of the forfeiture, but the court held that there had been no waiver of the forfeiture of the policy.[2]

A waiver of a right presupposes a knowledge of the right waived, and is not to be inferred from a merely negligent act, or from one done under a misapprehension of the real condition of the rights of the parties at the time.[3]

§ 341. **Same subject continued.** The acceptance by the treasurer, of the payment of unpaid assessments made by the beneficiary after the death of the member, is not a waiver by the society of any invalidity in the original contract of insurance.

In an action on a certificate of membership, the society

[1] Frost v. Saratoga, etc., Ins. Co., 5 Denis 516; Viall v. The Genesee Mutual, etc., 19 Barb. 440; Gans v. St. Paul, etc., Ins. Co., 43 Wis. 108; Masonic Mut., etc., v. Beck, 77 Ind. 203; Watson v. Centennial Mut., etc., 21 Fed. Rep. 698. To same effect see Commercial Ins. Co. v. Spankneble, 52 Ill. 53; Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Ætna Ins. Co. v. Maguire, 51 Ill. 342; Phœnix Ins. Co. v. Slaughter, 12 Wall 404; Ins. Co. v. Stockbower, 26 Pa. St. 199; North Berwick v. N. E. Ins. Co., 52 Me. 336; Viele v. Germania Ins. Co., 26 Iowa 9; May on Ins., section 507.

[2] Diehl v. Mutual Ins. Co., 58 Pa. St. 443; see Leonard v. Lebanon Mutual, etc., 3 Weekly Notes of Cases 527.

[3] Miller v. Union Central, etc., 110 Ill. 102; Robertson v. Metropolitan, etc., Co., 88 N. Y. 54.

defended on the ground that the deceased member had stated in his application that he was fifty nine years of age, when, in fact, he was sixty four years of age. It was claimed by plaintiff that the society, by its treasurer, had received of plaintiff, after her husband's death, two assessments against him, made just before he died, and that, at that time, the treasurer and some of the other officers had information of his true age. Upon these facts, it was contended that the society had ratified the contract, or was estopped from setting up such defence. The court said: "We think this ground untenable. There is no evidence that the directors had knowledge of Swett's true age, prior to their action rejecting the plaintiffs' claim in July 1883. Nor is there any evidence that the treasurer or any other officer of the corporation, acquired any knowledge or information of the fact, while in the discharge of any official duty. But assuming that the treasurer acquired notice of the fact when he received the assessments, he had no power to ratify the invalid contract. He could not admit a member, and thereby make a contract of insurance, and, if he had no power to make such a contract for the corporation, he had no power to validate a void contract by any ratification.[1]

A waiver of forfeiture procured by false representations is void.[2]

§ 342. Receipt of assessments, estoppel in pais. The doctrine of estoppel *in pais* is based upon a fraudulent purpose or fraudulent result. If the element of fraud is wanting, there is no estoppel, as where both parties were equally cognizant of the facts, and the declarations or silence of the one party produced no change in the conduct of the other, he acting solely on his own judgment. There must be deception and change of conduct in consequence.[3]

The mere act of receiving or collecting assessments by a society, with knowledge of an existing right of forfeiture, will not estop the society from setting up such forfeiture, unless the member, when he paid the assessments, had reason fairly to conclude, from the acts and declarations of the association, that the forfeiture had been or would be waived, or unless the payment was made in a reliance upon the validity of the contract of insurance, induced by the acts, declarations or silence

[1] Swett v. Relief Society, 78 Me. 541; 7 Atl. Rep. 394.

[2] Harris v. Equitable etc. Society, 64 N. Y. 196.

[3] Davidson v. Young, 38 Ill. 152.

of the society.[4] Thus, in N. W. Mutual, etc. v. Amerman 119 Ill. 329; 10 N. E. Rep. 225; (overruling 16 Ill. App. 528.) The member informed the company that he had changed his occupation from clerking to braking upon a railroad, and asked what change, if any, was necessary in his policy. The company informed him by letter that it could not issue a permit for his occupation as brakeman, but advised him, as he did not expect to be in that business long, to pay the premium on his policy, so as to have it in force when he should stop braking, and to take out an accident policy on his life, while in that business. The assured paid the premium, and was killed soon afterward while at work as conductor of a freight train, having been promoted from brakeman to that position. The court held that the doctrine of estoppel was not applicable to the receipt of the premium by the company under these circumstances, and that the company was not liable.

§ **343. Same subject continued.** Where membership in a mutual benefit society is, by the by-laws, made to depend upon continuance of membership in a particular organization, withdrawal from membership in such organization, forfeits all rights in the society; and the subsequent levy and collection of assessments by the society from one who had withdrawn from membership in such organization, does not continue his right of membership in such society. The member is as much bound by the by-laws as the society, and he cannot claim a waiver of their requirements by the society.[1]

By the constitution of a mutual benefit society, no person could be a member of it unless he was a member of the Improved Order of Red Men, and on failing to pay his dues to the I. O. R. M., he ceased to be a member of the benefit society. The two societies were independent, and had different officers. It was held that the receipt of assessments by the mutual benefit society in ignorance that the person paying them had ceased to be a member of the Red Men by reason of nonpayment of dues, was not an acquiescence in, or waiver of, the fact that he was not a member in good standing in the society; that to constitute a waiver it should, at least, appear that the officers of the society knew, or had notice of the fact, that the person had ceased to be a member of his tribe when they received his subsequent assessments.[2]

Where, after discovering that a member has made misrep-

[1] Burbank v. Boston Police Relief Association, 144 Mass. 434.

[2] Springmier v. Benevolent Association, etc., 5 Cin. Law Bull. 516.

resentations in his application, a society continues to collect assessments, it thereby waives any right it may have to declare invalid the certificate of membership obtained by such misrepresentations.[1]

If the society accept payment of an assessment after it has notice of a change in the habits of the assured, which by the terms of the policy would cause a forfeiture, it thereby waives the forfeiture.[2]

§ 344. Effect of return of assessment once paid. After the time had passed for the payment of an assessment, an agent of the society called upon the wife of a member, and collected it from her, giving her a receipt for it. The member had been drowned the day before, but neither the wife nor the agent knew that fact. The officers of the society learned of the fact before the money was paid into the treasury, and refused to receive it. The day after the member was buried, the agent called upon the widow, and explained to her the facts. She took back the money she had paid, and gave up the receipt she had received of him for it.

The court held that the widow, in taking back the money she had paid, and giving up her receipt therefor, did not release her rights in the fund,—the consideration, $1, the amount of the assessment returned, being grossly inadequate, as the fund amounted to $264; that the consideration of hardship upon the society had no weight, as it only lost the interest on $1 for a few days, and it might have had the dollar at any time by asking for it.[3]

§ 345. Attempt to collect assessments—waiver of forfeiture. An assured died on June 29, without having paid a premium which was payable June 28, on penalty of forfeiture of rights under the contract. After the premium was due,—to-wit, on July 2, the company addressed a letter to the assured, which contained the following: "The premium on your policy fell due June 28. If you wish to continue this policy in force, you will please remit above amount to this office by return mail and oblige."

The court held, in an action on the policy, that this letter

[1] Schwarzbach v. Protection Union 25 W. Va. 622; Watson v. Centennial Mutual etc., 21 Fed. Rep. 698; Ball v. Granite State Mutual Aid Association, N. H. 9 Atl. Rep. 103; Hoffman v. Supreme Council, 35 Fed. Rep. 252.

[2] Phœnix Mutual etc., v. Roddin, 7 Sup. Ct. Rep. 500.

[3] Mutual Relief Society v. Billau, (Superior Court of Cincinnati) 3 Am. Law Record 546. See §336.

clearly showed that the company had not elected to forfeit the policy for the failure of appellee to pay the premium when due, but that the right of forfeiture reserved in the policy had been waived." [1]

A mutual benefit society is estopped from claiming that a certificate of membership has been forfeited, where it recognizes its continued existence by notifying him that "it is now liable to immediate suspension, unless prompt attention be given to this notice.[2]

In an action on a certificate of membership, it was shown that notices of assessment and dues of date of Jan. 1, of dues, of March 1, and of May 1, were given to the deceased member, and default made in payment. It was claimed that by the default the deceased member, under the terms of the contract, forfeited his rights of membership. It was conceded that, by the terms of the contract, the society might have treated him as having forfeited all his rights, but it was shown that a like notice of dues and assessment came from the society's office addressed to the member of the date of July 1, following, and was taken from the post-office at his place of residence July 8, the day before he died. This notice required him to pay $2.10 within thirty-five days and contained the statement that "having no deaths, we omitted our usual assessments for March and May; this includes deaths reported to date." And it was further shown that, by letter dated May 20, of the same year, the secretary advised the member that his assessment of January had not been paid, and added: "You make a great mistake in not keeping up the insurance * * * Let me hear from you by enclosed postal if you want to drop out." After the death of Baker, and before the expiration of thirty-five days after the receipt of the notice of July 1, the plaintiff as beneficiary tendered payment of all unpaid dues and assessments, and the society refused to accept them.

It was held that there was sufficient evidence to permit the jury to conclude that the society had continued the membership of the deceased, and effectually waived his failure to make prompt payments.[3]

§ 346. Same subject continued. It has been held that where the contract relation of the society and the member is

[1] Chicago Life etc. v. Warner, 80 Ill. 411.

[2] Olmstead v. Farmers' Mut. etc. 50 Mich. 200.

[3] Baker v. N. Y. State Mutual Benefit Ass'n, 27 N. Y. Weekly Dig. 91; See Worden v. Guardian Mutual Life Ins. Co., 39 N. Y. Superior Ct. 317.

not wholly dissolved by the non-payment, within a certain time, of the assessment called for, but the liability of the society on the contract of insurance is merely suspended by such non-payment, so long as the asssessment remains unpaid, the society does not, by the levy of a second or subsequent assessment during the period of a default in the payment of a prior assessment, and during the period of consequent suspension of liability, remove the disabling consequences flowing to a member and his beneficiary from his neglect to pay his assessment.[1] The sending of notices of assessment after default, in such a case, will not be construed into an acknowledgment of liability upon the contract, and a waiver of the suspension, but will be held to be reminders to the member that he may, under the contract, revive his certificate.

A member of a mutual fire insurance company insured her property, and the policy contained a condition that, if such assessments as were laid by the company should not be paid within thirty days after notice thereof, the policy should be invalid so long as the assessment remained unpaid. In June, 1872 an assessment was made, and notice given to the member, who, however, neglected to pay it. In May, 1873, another assessment was laid on policies in force on January 1, 1873, and an agent of the company sent a notice of both assessments to the member. The property was destroyed by fire, and the member tendered payment of the two assessments within thirty days after receipt of her second notice. The tender was refused, and suit was brought by the member. It was held by the Supreme Court of Pennsylvania, that the act of the agent in sending the second notice of assessment was not in itself a waiver of the suspension of the policy, which had been worked by the non-payment of the assessment, and which was, under the contract, to continue until the assessment should be paid. And the court also held that, in order to recover, it was necessary for the member to further show that the company had laid the second assessment on this policy, thereby recognizing it as in force on January 1, 1873, and authorizing the sending of the notice.[2]

§ 347. Same subject continued. A certificate provided that a failure to pay any assessment within forty days

[1] Leonard v. Lebanon Co. Mutual 3 Weekly Notes of Cases 527; Crawford Co. Mutual v. Cochran, 88 Pa. St. 230.

[2] Leonard v. The Lebanon Mutual Ins. Co. 3 Weekly Notes of Cases 527.

after notice of the death of a member, should work a forfeiture of the member's rights. A resolution of the board of directors of the society provided that "the secretary notify all those whose policies have lapsed from non-payment of assessments or dues, that they may be reinstated in the company by producing to the secretary a certificate of good health from any regularly graduated physician, obtained at their own expense, and the payment of all dues and assessments." The member holding the certificate failed to pay five assessments made just prior to his death. In an action on the certificate the question was whether the notices of these five assessments, sent from time to time to the member, were in themselves sufficient evidence of a waiver of the forfeiture.

The Supreme Court of Pennsylvania said: "In considering this question regard must be had to the (above) resolution. * * * It appears by the testimony that the company acted under this resolution. The secretary says: 'I sent the notices to members that they might be reminded of their previous membership and might reinstate themselves, if possible.' This evidence was uncontradicted. This company appears, as its name implies, to have been organized upon the principle of mutual protection. A large amount of indulgence seems to have been extended to the members, and a liberal provision made by which defaulting members might be reinstated. It would be unjust to the company if this liberality should be turned against itself, and assessment notices which were intended for a different purpose should be held to be a waiver of a forfeiture in favor of a policy holder who never paid nor offered to pay his dues. We fail to see sufficient evidence of a waiver to justify the submission of that question to the jury."[1]

§ 348. **Same subject continued.** The unauthorized acts of the ministerial officers of a subordinate lodge, cannot operate to dispense with a member's duty to comply with the laws of the supreme lodge in regard to the prompt payment of assessments. A benefit society is not estopped from enforcing a forfeiture of a policy for non-payment of an assess-

[1] Mutual Protection Life Ins. Co. v. Laury, 84 Pa. St. 43.

ment by the fact that one of its sub-agents attempted, without special authority for the act, to collect a past due assessment.[1]

§ 349. Promise to receive past due assessments. The promise of a society to receive a past due assessment, made without any consideration, and after the assessment is past due, is not binding on it. The promise of a society, to waive a right of forfeiture, must either be supported by a valuable consideration, or it must be made by or on behalf of the society, while the member still has time and opportunity to make payment.[2]

§ 350. Effect of levy of assessment to pay death loss. The mere levy of an assessment by a society upon its members to pay a death loss, unaccompanied by any act recognizing the validity of a contract of insurance, is not a waiver of a forfeiture that has been worked in such contract; and the fact that, after the death of a member, the other members paid into the treasury of the society their voluntary assessments to meet the amount of the insurance, gives the beneficiary no additional rights.[3]

[1] Illinois Masons' Ben. Soc. v. Baldwin, 86 Ill. 479; Borgraefe v. Supreme Lodge, K. of H., 22 Mo. App. 127; Leonard v. The Lebanon Mutual, etc., 3 Weekly Notes of cases 527; See also as sustaining this proposition; Koelges v. The Guardian Life Ins. Co., 2 Lansing 480; Bouten v. American Mut. etc., 25 Conn. 542; Ryan v. The World Mutual, etc., 41 Conn. 168; Catoir v. American Life, etc., 33 N. J. L. 487; Wall v. Home Ins. Co., 8 Bosw. 597; Franklin Life, etc., v. Sefton, 53 Ind. 380.

[2] Marvin v. Universal Life, etc., 85 N. Y. 278; Underwood v. Farmers' etc. Ins. Co. 57 N, Y. 500.

[3] Swett v. Citizen Mutual, etc., 78 Me. 541; Me. 7 Atl. Rep. 394; Mayer v. Equitable Reserve Fund, etc., 42 Hun (N. Y.) 237.

ASSESSMENTS.—Part IV.

SEC. 351. } Property of society in assessments levied, or to be levied.
SEC. 352. } Are unpaid assessments assets of the society?
SEC. 353. } Can payment of them be enforced?
SEC. 354. } Interest of the society in the fund collected by assessments.
SEC. 355. }

§ 351. Property of society in assessments levied, or to be levied. Are unpaid assessments assets of the society? Can payment of them be enforced? As was briefly said in the beginning of this chapter, it may be stated, as a general rule, that an assessment under a certificate of membership in the nature of a policy of insurance in a mutual benefit society, does not make the member holding the certificate a debtor to the society, so as to authorize it, or its receiver, or assignee in bankruptcy, to bring suit, in case of neglect or refusal of such member to pay such assessment.

The measure of the member's liability is, of course, to be found in the contract of insurance. The principle upon which this contract is based, in mutual benefit insurance, is that the members of the society shall be at liberty to pay assessments, or not, as they shall elect; that membership in the society and contribution for death losses shall be merely voluntary; and that a member may, at any time, sever his connection with the society, and leave it without any claim upon him, and leave him without any claim upon it. Under such contracts, neither the death losses in the society nor the assessments to pay them, create any liability upon the member to pay. When such a society has been placed in the hands of a receiver or assignee, the fact that death losses had accrued against the society for which assessments should have been made, but which the society neglected to make, prior to the institution of proceedings for appointment of a receiver, or prior to the assignment, does not authorize the court to exercise the functions of the society by making these assessments. The amount to be assessed to pay death losses is not an asset of the society.[1]

[1] *In re* Protection Life Ins. Co., 9 Bissell 188.

§ 352. **Same subject continued.** The contract of insurance may modify this plan, and provide that the member shall be liable for all death losses and assessments made during the time he is a member of the society and entitled to the benefits secured by such membership. In such case, so long as he is a member, he is liable for death losses and assessments, and, on his refusal to pay, an action may be maintained therefor.

The by-laws of a society provided that "upon the death of any member of the association, it shall be the duty of the secretary to notify the member of the same, and thereupon each member shall within thirty days after such notification pay to the secretary the amount required by the rules of the association," and that if any member should neglect to pay any assessment required by the by-laws, "then, and in such case, such membership shall cease and determine at once without notice, and all claims be forfeited to the association." The court held that the neglect to pay an assessment for thirty days after notice thereof, *ipso facto* determined the membership of the delinquent; that he was liable for the amount of all assessments previously made, and also for all losses happening prior to the time when he ceased to be a member, though no assessment therefor had been made; that a receiver of the society, appointed in an action brought by the state to procure its dissolution, might assess the members for unassessed losses, and bring separate actions against each member to recover the assessments so made against him; and that it was the duty of the receiver to distribute the amounts so received equitably among the several creditors of the company.[1]

§ 353. **Same subject continued.** An application for insurance in a mutual benefit society contained a provision that the contract should become null and void on default of payment of an assessment. It also contained an agreement to pay all dues and assessments until the member should give notice of withdrawal, and made reference to the by-laws of the society. These by-laws required compliance with the stipulations of the application, and provided that the "member shall be held liable to the association for all dues and assessments until he shall have given notice of his desire to withdraw,"

[1] McDonald v. Ross-Lewin, 29 Hun. 87; see Hyatt v. Wait, 37 Barb. (N. Y.) 29. See § 276.

and that, "in case of default," such membership shall cease and determine at once without notice, and all claim shall be forfeited to the association. In construing these provisions of the application and by-laws, the Supreme Court of New York held that it was left optional with the society to terminate, or treat as terminated, the membership of one who is in default of payment of dues and assessments, or to continue his membership, and charge him with liability to pay dues and assessments until he gives notice of his withdrawal.[1]

Where a member is liable for death losses and assessments made while he was a member of the society, such liability is an asset in the hands of a receiver of the society.[2]

§ 354. Interest of the society in the fund collected by assessments. It has frequently been urged by counsel in the adjudicated cases that a mutual benefit society is an agent—a mere machine, for the collection of assessments, that such societies have no interest in the fund collected by them upon assessments for death losses, that the fund is the property of the beneficiary for whose benefit it was collected, and may not, for any reason, or upon any pretext, be withheld from such beneficiary. But courts have uniformly held, when they have passed upon the question, that such a doctrine is untenable.

When assessments have been paid into the treasury of a mutual benefit society, they become, in a certain sense, the property of the society. They are not assets of the society to the extent that they are subject to its general debts, but the amount collected on an assessment belongs to the society for the benefit of a special class of debtors—the beneficiaries, and is subject to the proper disposal of its officers.[3]

It is the right and duty of the society to protect, from all invalid claims, its members and the funds in its hands, for whatever purpose, and however, such funds may have been

[1] Baker v. N. Y. State Mutual Benefit Association, 27 N. Y. Weekly Dig. 91.

[2] For necessary averments in a complaint or declaration by a receiver against a member for unpaid assessment, see Downs v. Hammond, 47 Ind. 131; Embree, Receiver, v. Schideler, 36 Ind. 423. The contract is to pay upon the happening of certain contingencies—death of member, and order of assessment. In such cases, the statute of limitations does not begin to run until the date of the assessment. Smith v. Ball, Receiver, 107 Pa. St 352; In re Ins. Co. 10 R. I. 42; Bigelow v. Libby, 117 Mass. 359; Hope Mutual v. Weed, 28 Conn. 51; Howland, Receiver, v. Cuykendall, 40 Barb. 320.

[3] In re Protection Life Ins. Co., 9 Bissell 188; Fisher v. Andrews, 37 Hun (N. Y.) 176. Wilber v. Torgerson, 24 Ill. App. 119.

raised. Even where the society acquires a benefit fund by virtue of an assessment levied upon, and paid by its members for the purpose of paying a certain specified death loss, the society has such a property in, or relation to the benefit fund that it may refuse to pay that claim, and resist its payment on the ground of its invalidity. The society is, in a certain sense, the agent of its members, but it is an agent with special and defined powers and limitations, and the true and obvious construction of these powers and limitations forbids the payment of a claim which, for any reason, is invalid. The fact that it has realized the money by assessment for the purpose of paying such a claim, under the impression that it was, or might prove to be, a valid claim, is no waiver of its duty to see to it that no payment shall be made, in case the claim is, in fact, illegal. The duty of protecting such fund it still owes to its members who have paid their assessments and formed the fund, trusting to the fidelity of the society to protect them and it from invalid claims.[1]

§ 355. Same subject continued. Where members have paid to the society an assessment for a death loss, and the officers of the society have decided not to pay the claim, an assignment to the beneficiary, by the members, of the assessments so paid by them to the society, will not entitle the beneficiary to any part of the fund. After payment of assessments into the treasury of the society, the members can neither assign the fund, nor maintain an action to recover the assessments. The society controls the disposition of such fund.[2]

The funds of a society derived from assessments upon members to pay losses are, in their nature, trust funds, to be applied to the payment of such losses. The application of such funds to the purchase of the assets of another like society, or to the payment of losses upon contracts of insurance of such other society, the risks of which it has assumed, is a misapplication of them.[3]

[1] Mayer v. Equitable Life Association, 42 Hun (N. Y.) 237.

[2] Swett v. Citizens' Mutual etc., 78 Me. 541; 7 Atl. Rep. 394.

[3] State *ex rel.* v. Monitor etc., Ass'n., 42 Ohio St. 555; Stamm *et al.* v. N. W. Mut. Ben. Ass'n. Mich.; 32 N. W. Rep. 710.

CHAPTER XV.

Action on the Contract of the Society. Part I.

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§ 356. An action may be maintained on the contract. If a society, the contract of which provides for the payment of sick benefits or accident indemnity to its members, and the by-laws of which make no provision for a tribunal to decide questions arising between the society and its members, wrongfully refuses to fulfill its contract, an action at law may be maintained against it.[1]

There is a suggestion in some of the opinions in the books that no such action at law may be maintained, and the case of The Black and White Smiths' Society v. Vandyke, 2 Wharton (Pa.) 313, is always cited as sustaining that doctrine. In the opinion in that case, it is said:

"Even were there not a sentence in the way, payment of his stipendiary allowance could not be enforced by action. The society never consented to expose itself to the costs and vexation of an action for every weekly pittance that might be in arrears. * * * * The remedy by action is therefore miscon-

[1] Dolan v. Court Good Samaritan, 128 Mass. 437; Smith v. Society, 12 Philadelphia 380; Magee, Admr'x v. Clayton Lodge, etc., 5 Del. 453; Cartan v. Father Mathew Society, 3 Daly (N. Y.) 20; Kentucky Lodge, etc. v. White, 5 Ky. Law. Rep. 418.

ceived." The sentence which stood in the way of a recovery in that case, was the judgment of the society expelling the claimant, and the question for decision was, whether an expelled member could collaterally attack the rightfulness of his expulsion in a suit for benefits alleged to have accrued after his expulsion. The court was, without doubt, right in its conclusion that such a collateral attack might not be made.[1] But the question of the form of action, or the right of a member of a mutual benefit society to sue for benefits arising out of the contract of membership, was not before the court in that case. The opinion therein expressed is not based upon reasoning; it is a mere assertion. Nevertheless, afterward in Toram v. The Howard Beneficial Association, where a member of a society brought an action to "recover the amount of six weeks' benefits as a sick member," and where the plea was "*non assumpsit*," it was held in the court below that the Vandyke case was conclusive that such an action would not lie, and a verdict was directed for the defendant. The case was taken to the Supreme Court of Pennsylvania, and was decided upon another point. The ruling of the court below was not considered in the decision, although it was the only question discussed by counsel.[2]

In Smith v. Society, 12 Philadelphia 380, it was held that these cases were not binding upon the subordinate courts of the state, as authorities upon the proposition that an action for benefits may not be maintained by a member against the society, and judgment was rendered against the society on such a claim.

In the absence of provisions to the contrary in the contract of insurance, the member, or the beneficiary of a deceased member may resort to the courts, in the first instance, to enforce his claim against the society.

§ 357. Right of a society to provide methods for settlement of claims against it. The right of a society to provide methods for redressing grievances in all matters of discipline, and for deciding controversies in relation to its property, its doctrine, or its policy, is discussed in other parts of this work.[3]

There is a conflict of opinion as to the extent to which a mutual benefit society may go in restricting actions for benefits promised to members or their beneficiaries, in considera-

[1] See sections 413, 414.

[2] Toram v. The Howard Beneficial Association, 4 Barr. (Pa.) 519.

[3] See §§37, 48, 61, 129, 130, 133.

tion of the payment of dues and assessments. Some authorities are to the effect that such a society may provide in its contract of membership for a tribunal for the trial of any claim against it, arising from its agreement to pay benefits, may compel the claimant to submit his claim to the jurisdiction of such tribunal; and may make its powers plenary, and its action final. But the better rule seems to be that while a society which issues certificates of insurance agreeing to pay a certain sum of money as a benefit during a member's illness, or upon his death, in consideration of his payment of dues or assessments, may not, by provisions of its charter, by-laws, or certificates of membership, create in advance a judicial tribunal for the final and conclusive settlement of controversies that may arise from its agreements to pay benefits or death losses, yet it may, by such provisions or stipulations, create a tribunal within the society for the trial of such claims, and compel a member or beneficiary to submit his claims to such tribunal, in accordance with such provisions, before resorting to the courts of the land. It is just and reasonable that men voluntarily associating themselves for a worthy object should require of each other, in advance, an agreement that the internal affairs of the association shall first be brought before a body, or bodies of men, selected from the association, for discussion and decision, before they shall be made the subject of litigation in the public courts, and there is nothing in such an agreement in conflict with a member's right, under the constitutions and laws of the land, to appeal to the courts in matters pertaining to his property, and nothing which seeks to take away the jurisdiction of such courts.

§ 358. **Same subject continued.** There is manifestly a broad distinction between an agreement to do certain things before bringing an action, on the one hand, and an agreement to refer to arbitration, or to submit to and abide by the decision of the courts of a society, on the other hand. An agreement which merely requires certain acts to be done or omitted before bringing an action, not only does not attempt to oust courts of jurisdiction, but contemplates an appeal to the courts after certain preparation. An agreement to abide by the decision of the courts of a society, is equivalent to an agreement that no action shall be brought in the courts of the state.

While specific performance of an agreement to do or omit certain acts before bringing suit cannot be enforced, courts of

law or equity will refuse to take cognizance of a claimant's rights until he has sought to obtain them, and has exhausted his remedies in the tribunals of the society. To hold that such societies can establish judicial tribunals and confer upon them powers to decide finally and conclusively upon property rights, even of its own members, is to recognize in such societies the attributes of sovereignty; while to take away entirely the power to abridge the right to resort to the public courts, would greatly impair the usefulness and objects of these organizations.

The rule laid down above is believed to be liberal toward the objects of mutual benefit societies, and strictly in harmony with the principles of the law.

§ 359. Same subject continued. It will be observed that the controverted question is as to the legality of such provisions of the contract as seek to give to the tribunals of the society the exclusive jurisdiction of claims arising from its contracts. The decision of the question, therefore, effects all societies alike, whether they be incorporated or unincorporated. Where a by-law of an incorporated society provides that all claims against it, growing out of its contracts with its members, must be submitted to its own tribunals for settlement, and that the decision of such tribunals shall be final, the further question may arise as to whether such a by-law is necessary for the good government of the society, and whether it is reasonable that the debtor shall constitute itself the judge of its liability and of the amount which it ought to pay the creditor. As this question has never been decided in any of the adjudicated cases, no opinion will be expressed here upon the subject.

§ 360. When courts of society must be resorted to. When the charter, constitution or by-laws of a society require a member or beneficiary to first seek redress within the society itself, and by appeal to carry the question to its highest tribunal, he has no right to bring an action against the society in the courts of the land, until he has exhausted his remedy in the courts of the society.[1]

It has been held that, where a member makes a claim against a society for money due upon its contract, and claims to stand

[1] Poultney v. Bachman, 31 Hun (N. Y.) 49; Lafond v. Deems, 81 N. Y. 508; White v. Brownell, 2 Daly 329; Harrington v. Workingmen's Ben. Ass'n, 70 Ga. 340; Chamberlain v. Lincoln, 129 Mass. 70; Ellison v. Bignold, 2 Jac. & W. 505; McAlees v. Supreme Sitting, etc., Pa. St.; 13 Atl. Rep. 755.

in the relation of a creditor of the society, or where the beneficiary of a deceased member makes a claim against the society for money due upon its contract of insurance, a mere right to submit the claim to a tribunal of the society, and to appeal from its decision to a higher tribunal in the society, without a stipulation that the claimant *must* resort to the prescribed methods of procedure, does not abridge the right of the claimant to appeal, in the first instance, to the courts to coerce payment, when payment is withheld.

The corporate rights of a member of an incorporated mutual benefit society are subject to the control of the corporation, and the rights of a member of an unincorporated society are subject to the will of the majority, under the contract of membership. It is only proper and just, therefore, to hold that, when the society has legislated upon a matter concerning the contract of membership, and the rights that may arise thereunder, its provisions must be followed by one who claims relief under the contract of membership. Controversies concerning the discipline, property, government, dissolution, etc., of the society, arise directly from the contract of membership, and, where a mode of deciding controversies and settling disputes in such matters is provided for within the society, the prescribed mode must be pursued whether the language used in prescribing it be permissive or mandatory. But the rights of a member to sick benefits, or accident indemnity, and the rights of a beneficiary in the benefit fund, rest upon the contract entered into by and between the society and the member. The contract of the society to pay benefits or indemnity is a different contract from that of membership, although both contracts are often embodied in one. By the contract of membership, the member becomes a part of the society, and all his rights, as a member, are to be viewed from his relation to, and interest in the society. But in promising to pay benefits and indemnity to the member, or a benefit fund to his beneficiary, the society contracts with him as with a stranger, or, at least, it contracts with him in his capacity as an individual, not as a member, and their relations are to some extent antagonistic, and may become entirely so. The contract between the society and the insured is to be construed most strongly against the society, and in favor of the insured and his beneficiary, and where the contract merely gives to the insured a right to submit his claim to a tribunal of the

society for adjudication, it will not be so construed as to compel him to submit it.[1]

§ 361. **Same subject continued.** And then again, courts of justice are freely open to those who seek money due them upon contract, and the party who asserts that the right to invoke the aid of the court has been curtailed, must show a clear agreement abridging the right. If a man has a legal right, and the society to which he belongs adds others, that of submitting his claims to the society for adjustment, and that of appeal to its superior governing bodies, the added rights are merely cumulative; they are not exclusive. Positive words only can take away an existing right. Conferring a right to pursue a given course does not destroy an existing right; in order to destroy such a right, proper limiting words must be employed.[2]

It must be admitted that this principle has not been kept in view in the reported cases, but this distinction is certainly sustained by sound reasoning. It is analogous to the well-established general rule that where two courts, organized under the laws of the same state, have concurrent jurisdiction of the subject-matter of an action, the suitor may choose the one to which he will submit the adjudication of his rights.

§ 362. **Rules against common right must receive a strict construction.** It is easy for a society to make such provisions in its contract as it may deem desirable and necessary, and there is no reason why such provisions should be extended by construction. When rules and articles of association are resorted to against common right, courts lean to a strict construction. A by-law of a society, which provides for a right of appeal from the proceedings of a lodge "in all matters of form required by the constitution and laws of the order," does not apply to a resolution directing that sick benefits be, or be not, paid, but only has reference to those observances for breach of which there may be trial and punishment.[3]

One of the by-laws of a society provided that "every matter in dispute between this institution, or any person acting under or on behalf of this institution, and any member thereof or

[1] See section 165.

[2] Bauer v. Sampson Lodge, 102 Ind. 262; 1 N. E. Rep. 57 1; Supreme Council v. Garrigus, 104 Ind. 133; 3 N. E. Rep. 818.

[3] Matoon v. Wentworth, 4 Cin. Law Bull. 513.

person claiming on account of any such member, shall be referred to, and decided by arbitrators appointed" etc. In construing this rule, it was held that it did not apply to the case of a claim by the administrator of a member for the amount of a certificate of insurance on the life of such member, and, consequently, that those provisions were no answer to an action by an administrator on the certificate. The court says: "The case of an executor does not fall within this language, for he does not claim on account of the member, but on his own account."[1]

§ 363. **Same subject continued.** Where the by-laws of a society provide that the board of trustees shall examine all claims of members for sick benefits, and, if found correct, shall order the same to be paid, a member may not resort to a suit at law for such benefits, without giving the board an opportunity to examine his claim.[2] But the fact that the laws of a society provide that any sick brother shall report to the chief officer of the society, whose duty it shall be to draw on the treasurer for the sum allowed by law, if he is satisfied that the brother is entitled to sick benefits, does not make his decision final. In such case the officer acts merely as an agent of the lodge, and possesses no judicial authority.[3]

The laws of a mutual benefit society provide that, on notice of the disability of a member, a board of physicians shall examine him, and report to the supreme council; that all proofs for death or disability benefits shall be approved by the subordinate council; and that, upon approval of satisfactory proofs of a member's disability, he shall be entitled to a benefit. These provisions do not give the subordinate council the right to reject a claim for either a death or disability benefit. Such a right will never be presumed, but must be given in the clearest and most explicit terms.[4]

§ 364. **Authorities holding that society may make decision of its tribunal final.** In determining whether the court would inquire into the suspension, by the society, of the payment of weekly benefits to a member, it was said in Fritz v. Muck, 62 How. Pr. 70; "Can the right to recover

[1] Kelsall v. Tyler, 34 Eng. L. & Eq. 588. The decision in this case is placed mainly upon another ground.

[2] Robinson v. Irish American etc. Society, Cal.; 7 Pac. Rep. 435.

[3] Ky. Lodge v. White, 5 Ky. Law Rep. 418.

[4] Albert v. Order of Chosen Friends, 34 Fed. Rep. 721.

them be passed upon here? Those were payable in case of sickness or inability to work. The association, by its rules, provided a means of ascertaining the circumstances under which, or by reason of which, the party should be entitled. The degree of sickness or inability was, in the very nature of the case, an open and indefinite matter. How much departure from the standard of full health would be necessary, or what the standard should be, or what would constitute inability to labor, would, in many cases, be very difficult to determine by any legal rules. The propriety, therefore, if not necessity, of leaving this matter to be determined by the society or its committee, according to its own rules, assented to by all its members is, to my mind, very apparent. And as long as the society and its committee acted in good faith, without fraud, their determination should be deemed conclusive."[1]

The charter of a society provided that, under certain circumstances, in case of sickness, a member was to be allowed a certain sum per week. "This allowance is to be made from the time of his application in writing to the president, whilst so much remains in the funds." In an action for benefits under the charter, plaintiff introduced the charter, proved membership, sickness and application to the president. The record does not state whether there had been any decision on the application by the president, or the society.

The Supreme Court of Pennsylvania, in deciding this case, said: "The corporation is bound by the fundamental articles to pay only when it is in funds, and it has determined that it is not. As the plaintiff in becoming a corporator assented to its acts prospectively to be done, according to the charter of its constitution, he is concluded by the decision of his own forum. We are to believe that the proper authorities passed judicially on his claim, and we are not to rejudge their judgment."[2]

§ **365. Authorities continued.** In Van Poucke v. Netherland St. Vincent *de* Paul Society, Mich.; 6 Western Rep. 132; 29 N. W. Rep. 863, it was held that a by-law of a mutual benefit society, which invests a committee with authority to determine whether a member claiming to be sick, is entitled to the benefit provided for in the by-law, is valid and reasonable, and where a member applies to the society for aid, the decision of the committee is final.

[1] (But see Austin v. Searing, 16 N. Y. 112-123, Section 368.

[2] Foram v. Howard Beneficial Association, 4 Pa. St. 519.

In Cincinnati Lodge I. O. O. F. v. Littlebury, the Hamilton District Court held that the decision as to the right to benefits under the by-laws of a mutual benefit society, made by the officer or body which the constitution required should decide it, was conclusive, and could not be reviewed by the courts.[1]

Where a member of an incorporated mutual benefit society has a claim against the society for benefits under its by-laws, which has been disputed, and decided against him by the decision of the proper tribunal acting under the general laws and by-laws of the order, "whose decision," it is provided, "shall be final," a court of law has no jurisdiction over an action to recover such benefits.[2]

The laws of a mutual benefit society provided that where a member had a cause of complaint against the society for benefits, he should appeal to the different courts of the order naming them, and should he neglect to pursue this course, and bring a suit in court, he should be expelled from the society. A member presented a claim against the society to the proper tribunal of the order, appealed to each of the courts as provided in the laws, and in each of these courts his claim was denied. He then brought suit in the courts of the state of Maryland, but it was held, following Anacosta Tribe v. Murbach *supra* that the courts of that state had no jurisdiction of the claim.[3]

§ **366. Authorities continued.** A corporation was organized under the laws of Illinois for the purpose of providing for its members in case of permanent disability, and for their dependents in case of death, by assessments to be levied on surviving members. Its constitution provided; "all claims against the association shall be referred to the board of directors, whose decision shall be final," and "assessments shall not be made, except on its authority." A claim against the corporation for $2500.00, on a contract of insurance issued by it upon the life of a deceased member, was made before the board of directors.

The board of directors, at a regular meeting, after an investigation of the facts in regard to the claim, by a unanimous vote, refused to allow the claim and ordered an assessment for its payment, assigning as a reason that the deceased was at

[1] 6 Cin. Law Bull., 237; see also Mohawk Lodge v. Wentworth, 4 Cin. Law Bull. 513.

[2] Anacosta Tribe v. Murbach, 13 Md. 91.

[3] Osceola Tribe v. Schmidt, Adm'r 57 Md. 98.

least sixty days delinquent in the payment of his assessments at the time of his death. Suit was afterward brought upon the policy in the U. S. Circuit Court, N. D. Illinois. Blodgett, J. held that the power of these directors, in regard to the allowance of this claim, and the ordering of an assessment to pay it, was plenary and final, and that after the decision of the board, refusing payment of the claim, no suit could be maintained upon it. In this opinion the learned judge cites no authorities, but reasons as follows. "It was certainly competent for the members of this association to agree among themselves that the action of their board of directors in reference to any claim presented against the society should be final, and there can be no doubt, from the language of the clause of the constitution just quoted, that they have so agreed. The duty of the board of directors is two fold; first, to approve the claim, and, second, to order an assessment to pay it, and no member is under any obligations, expressed, or implied, to pay an assessment for the liquidation of a claim against the association unless the claim has been approved by the board of directors, and the assessment ordered by the board. Waiving, therefore, all questions as to whether the board of directors would be under any more obligations to approve this claim after a judgment had deen rendered in favor of this plaintiff than before, it is sufficient to say that it seems clear to me that the sole power of determining whether the association should or should not pay a claim, and an assessment be ordered to pay it, is vested in this board of directors, and no court can review or re-examine their decision in that regard. The constitution says the action of the board shall be final, and the courts must so treat it."

§ 367. Authorities holding that society may not make decision of its tribunal final. The opinion in the case of Bauer v. Sampson Lodge, etc., 102 Ind. 262, is worthy of examination in considering the power of a society to establish tribunals for determining claims against it, and, in order that it may be the more readily consulted, it is given here almost at length. But, before quoting from the case, it should be said that this case and Supreme Council, etc., v. Garrigus, 104 Ind. 133, are sometimes cited as sustaining the broad proposition that a society which issues contracts of insurance, or agrees to pay benefits, cannot, by provisions in such contracts and agreements, compel a member or beneficiary to resort to the courts of the society and exhaust his remedies therein, before bring-

ing an action in the public courts on such contract. While the discussion and argument of the questions involved took a wide range in these cases, the points decided by the court by no means sustain such a proposition.

In Bauer v. Sampson Lodge, *supra*, it is said: "The reasonable rule is, that such an organization may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed method of procedure before invoking the powers of courts, but that it may not entirely prohibit members from suing to recover benefits accruing to them under the by-laws of the organization. Men voluntarily enter such organizations, and in becoming members subscribe to their laws, and if these laws make provision for trying controversies, the member aggrieved must pursue the course prescribed, before resorting to the courts to enforce his claims. There is no valid reason why he should not be compelled to do what he has agreed, and the harmony and efficiency of such organizations require that all measures provided and required by their by-laws should be exhausted before appealing to the courts to settle the controversy. On the other hand, it would be unjust to permit such organizations to take from their members all right of action for money due them. Claims for money due by virtue of an agreement, are unlike mere matters of discipline, questions of doctrine, or of policy, and are not governed by the same rules. A corporation which promises to pay a certain sum as benefits during a member's illness, in consideration of his payment of dues, is not a purely benevolent organization; it may be, and doubtless is, benevolent and charitable in a great degree, but it is not a benevolent organization in the sense of dispensing benefits without consideration. The consideration the order receives is the dues paid by the member, and in return it promises him benefits. In speaking of an order of a character similar to the Knights of Pythias, the Supreme Court of Massachusetts said: 'The corporation is not a mere charitable society, but is rather in the nature of an association for the mutual insurance of its members against sickness or accident. If it refuses to perform its contract contained in the by-laws, the member who is injured, may have recourse to the proper courts to enforce the contract.'[1] Our own decisions have recognized a like doctrine as applicable to the life-insurance features of such organizations.[2]

[1] Dolan v. Court of Good Samaritan, etc., 128 Mass. 437.

[2] Elkhart Mut., etc., v. Houghton, 98 Ind. 149; Supreme Lodge, etc., v. Schmidt, 98 Ind. 374.

It is not within the power of individuals or corporations to create judicial tribunals for the final and conclusive settlement of controversies. * * It is to be noted that agreements to submit a matter to arbitration, are valid when made after the specific controversy has actually arisen, and not when made in advance, certainly not when the agreement provides that one of the interested parties shall be the sole arbitrator. The weight of authority is very decidedly against the power of parties to bind themselves in advance that a controversy that may possibly arise shall be conclusively settled by an individual or corporation, and to that doctrine this court is committed.[1]

As all persons having a money demand against an individual or a corporation have a right to resort to the courts in the first instance, when payment is withheld, to coerce payment, that right must exist unless it clearly appears that it has been abridged or surrendered. In the case before us the answer concedes the right to the benefits claimed, but affirms that an action cannot be maintained because the claimant has not taken the steps which must precede the assertion of the claim in a court of justice. In order that this general right, a right possessed by all citizens, should be curtailed, it must clearly appear that he to whom the money is due, has agreed that it may be abridged. One who asserts a claim to money due upon a contract, occupies an essentially different position from one who presents a question of discipline, of policy, or of doctrine of the order or fraternity to which he belongs. All the decisions, from first to last, recognize a broad distinction between the two classes of cases, and the one before us belongs to the class where property rights are involved, and is a member of a class cognizable by the courts. The policy of the law, as declared in our constitution and by our decisions, is to freely open the courts to those who seek money due them upon contract, and the party who asserts that the right to invoke the aid of the courts has been curtailed, must show a clear agreement abridging the right. These principles necessarily lead to the conclusion that a corporation which has agreed to pay pecuniary benefits to one of its members cannot successfully resist an appeal to the courts without showing an express or implied agreement that before making such an appeal the

[1] Kistler v. Indianapolis, etc., R. R. Co., 88 Ind. 460; Insurance Co. v. Morse, 20 Wall. 445; Mentz v. Armenia Ins. Co., 79 Pa. St. 478; Wood v. Humphrey, 114 Mass. 185.

members shall pursue a course of procedure prescribed by the laws of the organization.

In the case in judgment there is a clear right to the benefits claimed, for so the by-laws provide, and where there is a right there is a remedy. It there is a remedy it is the usual one unless by a legal contract the parties have otherwise agreed. Here the usual remedy, open and free to all citizens having a just demand, is an ordinary action at law, and the question narrows to this, has the claimant abridged his remedy by contract? We find nothing in the by-laws which can be deemed a partial or a total surrender of his right to enforce his contract in the usual method. It is true that there is a general right of appeal provided for, but there is no stipulation that the claimant of benefits shall appeal; and, if we are correct in our reasoning, there is no abridgment of his right to pursue the usual remedies. In order to abridge this right there must be a stipulation to that effect. Men do not lose their legal right to enforce their contracts unless they have yielded it up by agreement. The provision that an aggrieved party may appeal is permissive, it does not wrest from him the right conferred upon him by law. If a man has a legal right, and the corporation of which he becomes a member adds another, that of appeal to its superior governing bodies, the added right is merely cummulative, it is not exclusive; positive words only can take away an existing right. Conferring a right to pursue a given course does not destroy an existing right; in order to destroy such a right proper limiting words must be employed. Here there are no limiting words, there is nothing that limits the general right to sue in the courts, and a right such as this cannot be taken away without a clear agreement surrendering it. If it had been the intention to require members to surrender their right to sue at once upon the breach of the contract, and to compel them to first appeal to the grand bodies of the order, it would have been easy to so declare, but there is no such declaration, and, therefore, no agreement taking away the right to sue for the enforcement of the contract, which the claimant possessed by virtue of the law of the land.

The right to sue is one given, as we have seen, by law, and no custom can be good which is contrary to law. A custom that a party having a claim for money due upon contract may not pursue the usual remedies provided by law, is not valid."[1]

[1] Manson v. Grand Lodge, etc., 30 Minn. 509; Thompson v. Ins. Co., 104 U. S. 252; Franklin Ins Co. v. Humphrey, 65 Ind. 549; Spears v. Ward, 48 Ind. 541.

§ 368. Authorities continued. In Poultney v. Bachman, 10 Abb. New Cases 252, it was held that a society could not, by an attempt through its constitution and by-laws to confer upon its own tribunals the exclusive power to decide upon claims against it, deprive the courts of jurisdiction to entertain actions against it.

In treating of the power of individuals or societies to create judicial tribunals, the Court of Appeals of New York says:

"The effect of some of these provisions of these constitutions is to create a tribunal having power to adjudicate upon the rights of property of all the members of the subordinate lodges, and to transfer that property to others; the members of this tribunal being liable to constant fluctuations, and not subject in any case to the selection or control of the parties upon whose rights they sit in judgment. To create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunals for themselves, in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules. A contract that the parties will submit, confers no power upon the arbitrator, and even where there is an actual submission, it may be revoked at any time. The law allows the party up to the last moment to ascertain whether there is not some covert bias or prejudice on the part of the arbitrator chosen. It would hardly accord with this scrupulous care to secure fairness, in such cases, that parties should be legally bound by the sort of engagement that exists here, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuation."[1]

In Scott v. Avery, 5 House of Lords Cas. 811, the Lord Chancellor says: "There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases."

§ 369. Authorities continued. In Stephenson v. Ins. Co., 54 Me. 70, the court says:

"While parties may impose as condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law, and not the contract, prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy

[1] Austin v. Searing, 16 N. Y. 112-123.

in a given case than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void."

In Home Ins. Co. of N. Y. v. Morse, 20 Wall, 445, approved in Barron v Burnside, 121 U. S. 186, the Supreme Court of the United States says: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life, or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in Cancemi v. People 18 N. Y. 128, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may, no doubt, waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." [1]

§ 370. Limitation as to time when action may be brought. A mutual benefit society may, by proper provisions of its charter, by-laws or certificates, stipulate that any claim for benefits shall be made within a given period of time, or that no action against the society for the recovery of any claim upon the contract shall be maintained, unless commenced within a certain period after the cause of action shall accrue. As the statutes of limitations only provide that no suit shall be brought on a claim after a certain number of years, there is nothing in these acts abridging the right of parties to contract for a shorter limitation of time. Such limitations are strictly construed and must be reasonable.[2]

Where the certificate of a mutual benefit society provides that all suits to recover benefits under it, shall be begun within six months after the death of the member insured, and within that time an injunction, enjoining the beneficiary from receiv-

[1] Nute v. Hamilton Mutual etc. 6 Gray (Mass.) 174; Hall v. People's Mut. etc., 6 Gray (Mass.) 185.

[2] May on Insurance at section 478 *et seq.*; Bliss on Life Insurance at section 355 *et seq.*

ing payment, prevents him from beginning suit until after the expiration of the six months, the six months' limitation no longer exists after the removal of the injunction, and suit may be brought at any time within the statute of limitations.[1] This contract period does not open and expand, like the period of limitations imposed by statute, so as to receive within it a period of legal disability, and then close together at each end of that period, as though the period of legal disability had never occurred: the contract period relates to the six months next after the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to six months, made up of the days in a period of time prescribed by the statute of limitations, in which the plaintiff may commence his suit. In such a case, where a cause intervenes which prevents the plaintiff from suing before the specified contract period expires, the contract bar cannot be afterward revived, but is absolutely removed, and the plaintiff is then only bound by the limitation prescribed by statute.[2]

§ 371. Limitation as to time continued. Where the contract of insurance provides that no action on the contract may be maintained, "unless commenced within six months after the loss,"—"unless commenced within one year after any claim shall accrue," "unless commenced within a term of twelve months next after the loss or damage shall occur,"—etc.; and further provides that a loss shall not be payable until a certain time after the proofs of loss, or of death, have been furnished, the period of limitation does not begin to run until the certain time fixed after the proofs have been furnished.[3]

If the delay to bring suit within the designated period is a result to which the society mainly contributed by holding out hopes of an amicable adjustment, it will not be permitted to take advantage of such delay; and if, after the expiration of such period, it enters into any negotiations with the beneficiary whereby it recognizes the continued validity of the certifi-

[1] Earnshaw v. Sun Mutual Aid Society, Md., 12 Atl. Rep. 884.

[2] Semmes v. Insurance Co., 13 Wall. 158.

[3] Hay v. Star Ins. Co., 77 N. Y. 235; Ellis v. Council Bluffs Ins. Co., 64 Iowa 507; Killips v. Putnam Ins. Co., 28 Wis. 472; Chandler v. St. Paul F. & M. Ins. Co., 21 Minn. 85; Mutual A. & L. Ass'n v. Kayser, 14 W. N. Cas. (Pa.) 86; Spare v. Home Mutual, etc., 17 Fed. Rep. 568; Friezen v. Allemania Ins. Co., 30 Fed. Rep. 352; Vette v. Clinton Ins. Co., 30 Fed. Rep. 668; Barber v. Ins. Co., 16 W. Va. 658. But see Johnson v. Ins. Co., 92 Ill. 91, and Refining Co. v. Ins. Co., 12 Ont. App. 418.

cate, it will be held to have waived its right to plead the limitation.[1] Repeated promises, from time to time, that payment or settlement will be made, and declarations that there is no need of proceeding by law to enforce payment, are a sufficient excuse for not prosecuting the claim against a society.[2] If the beneficiary is induced to delay his action on a certificate by the fraud of the society, or by its holding out the reasonable hope of payment, the limitation will be disregarded.[3] But mere negotiations for a settlement are not sufficient to show a waiver of the limitation of time.[4]

§ **372. Limitation as to place where action may be brought.** It may be laid down as a general rule that limitations as to the place where actions shall be brought are invalid. The leading case upon this subject is Nute v. Hamilton Mutual Insurance Company, 6 Gray 174. In delivering the opinion in this case, Shaw, C. J. says: "The provision on which the defense depends is found in article 22nd of the by-laws. After providing that notice of loss shall be given, and that thereupon the directors shall proceed to determine whether any loss has occurred for which the company are liable, and if so, ascertain the amount, it provides that if the assured do not acquiesce in such determination, as to the liability or extent of it, and both parties do not agree to refer, as they may, 'the assured may, within four months after such determination, but not after that time, bring an action at law against the company for the loss claimed, which action shall be brought at a proper court in the county of Essex.' Here are no negative words, and strictly speaking, no stipulation that the action shall not be brought elsewhere, unless they are implied by the term 'shall be brought' in Essex. These words were not necessary to give the assured a remedy, because without them it is conceded that they would have a remedy at common law, as in all cases of breach of contract, for which no stipulation is necessary. * * * * The court is of the opinion that there is an obvious distinction between a stipulation by contract, as to the time when a right of action shall accrue and when it shall cease, on the one hand, and as to

[1] Martin v. State Ins. Co., 44 N. J. L. 485.

[2] Home Ins. Co. v. Myer, 93 Ill. 271; Andes Ins Co. v. Fish, 71 Ill. 620; Bish v. Hawkeye Ins. Co., 69 Iowa 184; St. Paul F. & M. Ins. Co v. McGregor, 63 Texas 399.

[3] Derrick v. Lamar Ins. Co., 74 Ill. 404; Little v. Phœnix Ins. Co., 123 Mass. 380.

[4] Allemania Ins. Co. v. Little, 20 Ill. App. 431

the forum before which, and the proceedings by which an action shall be commenced and prosecuted. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract and the acts of the parties; the other is a stipulation concerning the remedy which is created and regulated by law. Perhaps it would not be easy or practicable to draw a line of distinction, precise and accurate enough to govern all these classes of cases, because the cases run so nearly into each other; but we think the general distinction is obvious. The time within which money shall be paid, land conveyed, a debt released, and the like, are all matters of contract, and depend on the will and act of the parties; but, in case of breach, the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The stipulation, that a contracting party shall not be liable to pay money, or perform any other collateral act, before a certain time, is a regulation of the right too familiar to require illustration; a stipulation, that his obligation shall cease if payment or other performance is not demanded before a certain time, seems equally a matter affecting the right. A stipulation, that an action shall not be brought after a certain day, or the happening of a certain event, although, in words, it may seem to be a contract respecting the remedy, yet it is so in words only; in legal effect it is a stipulation that a right shall cease and determine if not pursued in a particular way within a limited time, and then it is a fit subject for contract, affecting the right created by it. But the remedy does not depend on contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract. Suppose it were stipulated in an ordinary contract, that in case of breach no action shall be brought; or that the party in default shall be liable in equity only and not at law, or the reverse; that in any suit to be commenced no property shall be attached on mesne process or seized on execution for the satisfaction of a judgment, or that the party shall never be liable to arrest; that, in any suit to be brought on such contract, the party sued will confess judgment, or will waive a trial by jury, or consent that the report of an auditor appointed under the statute, shall be final, and judgment be rendered upon it, or that the parties may be witnesses, or, as the law now stands, that the plaintiff will not offer himself as a witness, that, when

sued on the contract, the defendant will not plead the statutes of limitations, or a discharge in insolvency; and many others might be enumerated; is it not obvious, that, although in a certain sense these are rights or privileges which the party, in proper time and place, may give or waive, yet a compliance with them cannot be annexed to the contract, cannot be taken notice of and enforced by the court or tribunal before which the remedy is sought, and cannot therefore be relied on by way of defense to the suit brought on the breach of such contract? * * * * The rules to determine in what courts and counties actions may be brought, are fixed upon consideration of general concurrence and expediency by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience. Such contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from the personal, social or political standing of parties in one or another county. It might happen that a mutual insurance company, in which every holder of a policy is a member and, of course, interested, would embrace so large a part of the men of property and business in the county, that it would be difficult to find an impartial and intelligent jury. * * * * There being no authority upon which to determine the case, it must be decided upon principle. The question is not without difficulty, but, upon the best consideration the court have been able to give it, they are of opinion that it is not a good defense to this action, that it was brought in the County of Suffolk, and not in the County of Essex."

§ 373. Limitation as to place continued. In Hall v. People's Mut., etc., 6 Gray 185, the court says: "It is a well-settled maxim that parties cannot, by their consent, give jurisdiction to courts where the law has not given it; and it seems to follow from the same course of reasoning, that parties cannot take away jurisdiction where the law has given it."[1] But under some circumstances and conditions limitations upon the place of bringing actions have been held valid.[2]

[1] See Bartlett v. Union Mut., etc., 46 Me. 500; Reichard v. Manhattan Ins. Co., 31 Mo. 518; Amesbury *et. al.* v. Ins. Co., 6 Gray (Mass.) 596.

[2] Boynton v. Middlesex Mutual Fire Ins. Co., 4 Met. (Mass.) 212; Arnet v. Milwaukee Mutual, etc., 22 Wis. 516.

Action on the Contract of the Society.

Part II.

SEC. 374. }
SEC. 376. } Pleading and evidence.
SEC. 377. Admissibility of declarations of a member.
SEC. 378. }
SEC. 379. } Proofs of death.
SEC. 380. }
SEC. 383. } Actions on by-laws for benefits.

Sec. 374. Pleading and evidence. In a suit on a policy of life insurance, procured by the insured for the benefit of another, it is not necessary that the declaration should aver that the beneficiary had any interest in the life of the insured, but a different rule prevails where one procures an insurance on the life of another. In such a case, the plaintiff must aver in his declaration the facts showing that he had an insurable interest in the life insured.[1] The same rule prevails in suits on contracts of insurance in mutual benefit societies. A stranger, who obtains a membership for another in any such society, where the membership secures to him an insurance upon the life of the member, must aver and prove the facts showing an insurable interest in the life of the member.[2]

In suits upon a policy payable to a stranger, it is proper to leave it to a jury to say whether under all the circumstances of the case, the contract was entered into by the parties in good faith, or as a means of procuring a wager upon life.[3] The mere payment of premiums by the beneficiary is not conclusive evidence that the policy was taken out by him.[4]

Although charter, by-laws, constitution, rules, regulations and application are a part of the certificate of membership and contract of insurance, it is not necessary to file a copy of any of these with the complaint or declaration. The burden is on

[1] Guardian Mut. etc., v. Hogan, 80 Ill. 35; Franklin Life etc. v. Sefton Adm'r. 53 Ind. 380.

[2] Elkhart Mutual, etc., v. Houghton, 98 Ind. 149.

[3] Conn. Mut. etc. v. Schaefer, 94 U. S. 457; Aetna Life v. France, 94 U. S. 561; Swick v. Home Life, 2 Dill 160; Langdon v. Union Mut. etc., 14 Fed. Rep. 272.

[4] Tuston v. Hardey, 14 Beav. 232; Armstrong v. Mut. Life etc., 13 Rep. 71.

the defendant to aver and prove the falsity of any statement in the application, or that the contract was issued contrary to the by-laws or rules of the society, and this is true although the by-laws, rules and application may be set out in full in the complaint or declaration, and whether the answers in the application are representations or warranties.

There are cases in conflict with this rule, but it is undoubtedly supported by the later and better authorities as well as by the better reason.[1] In Piedmont Ins. Co. v. Ewing, *supra*, it is said: "The number of questions now asked of the assured in every application for a policy, and the variety of subjects and length of time which they cover are such that it may be safely said no sane man would ever take a policy, if proof, to the satisfaction of a jury, of the truth of every answer were made known to him to be an indisputable prerequisite to payment of the sum secured; that proof to be made only after he was dead and could render no assistance in furnishing it. On the other hand, it is no hardship that, if the insurer knows or believes any of the statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest, and, if he has any reasonable ground to make such an issue, he can show the facts on which it is founded."

In a suit upon a contract of insurance, where the issue is as to the truth of the answers of the insured in his application, the possible action which the company might have taken, if the insured had answered otherwise than he did, is inadmissible.[2]

Where an attempt is made to aver notice and proof of death, as required by a certificate in a mutual benefit society, it may be aided by an averment that the society is in default for not paying the benefit according to the terms of the certificate.[3]

Where a policy of insurance provides for the payment of different sums to different persons, it is improper for beneficiaries to join in one action to recover the several sums due, but, if they do, the court may order each beneficiary to file his separate petition, and defendant to answer each, without further service of process.[4]

[1] Piedmont Ins. Co. v. Ewing, 92 U. S. 377; Continental Life etc. v. Rogers, 119 Ill. 474; 10 N. E. Rep. 242.

[2] N. W. Benevolent etc., v. Hall, 118 Ill. 169; 8 N. E. Rep. 764.

[3] National Benefit Ass'n. v. Grauman, 107 Ind. 288; 7 N. E. Rep. 233.

[4] Keary v. Mut. Reserve etc., 30 Fed. Rep. 359.

§ 375. Pleading and evidence continued. Where a member has attempted to change the designation of his beneficiary, and the original beneficiary brings suit on the certificate, he must aver and prove that the change attempted to be made, was invalid.[1] Where a benefit certificate is made payable to a certain person in its inception, the burden of proof is upon parties claiming an assignment of such certificate to them, to show a *prima facie* valid transfer of the benefit accruing from said certificate to themselves, in pursuance of the constitution and by-laws of the order.[2]

In a suit on the by-laws of a society for benefits, plaintiff must state how the obligation to pay money arises, what the rules and regulations are, and that he has complied with them. A statement of demand, claiming a balance to be due during plaintiff's sickness, at the rate of $3 per week, "the sum paid by the society to the sick of the society" does not contain a legal cause of action.[3]

In an action on a contract of insurance issued by a mutual benefit society, proof by the society of its custom and usage in the management of its affairs and the payment of the assessments, and of the decisions of its officers respecting the construction of the contract, are inadmissible.[4]

A contract of insurance in a mutual benefit society provided that the money should be payable, in case of a member's death, to his wife, her executors, etc., as directed by said member in his application, "or to such other person or persons as he might subsequently direct by will or otherwise." In an action on the certificate by the wife, it was held that she need not allege in her complaint that the deceased member had not directed the money to be paid to any other person, as that was a matter of defense.[5]

In actions on certificates of membership issued by mutual benefit societies, designed to secure the payment of money to those dependent upon their members, after the death of such members, courts should construe the rules and regulations of

[1] Masonic Mutual, etc., v. Burkhart, 110 Ind 189; 11 N. E. Rep. 449.

[2] Henry v. Grand Lodge, 15 Ill. App. 151

[3] Beneficial Society v. White, 30 N. J. Law 313.

[4] Manson v. Grand Lodge, 30 Minn. 509; 16 N. W. Rep. 395; Wiggin v. Knights of Pythias, 31 Fed. Rep. 122; Bauer v. Sampson Lodge, etc., 102 Ind. 262, Thompson v. Ins. Co., 104 U. S. 252; Franklin Ins. Co. v. Humphrey, 65 Ind. 549; Davidson v. Supreme Lodge, 22 Mo. App. 263.

[5] Laudenschlager v. N. W. Endow, etc., Ass'n, Minn. 30 N. W. Rep. 447.

such societies liberally to effect the benevolent objects of their organization, and that doctrine of construction is applicable generally to rulings on questions of evidence, as well as in other respects.[1]

§ 376. Pleading and evidence continued. In Georgia, it was held, that under the statute of that state relating to competency of witnesses, where the contract in issue had been made between an incorporated mutual benefit society and a member, and the latter had died, the officer or agent entering into the same in behalf of the corporation was an incompetent witness; but that the other members of the society were competent.[2]

Where the plaintiff's right of recovery is dependent upon the fact that the deceased member was in good standing in the society at the time of his death, the burden of proof is on the plaintiff to show such good standing of the member.[3]

In an action upon a certificate of membership, reciting that the deceased was a "beneficiary member in good standing" in the society, and that upon his death a sum would be paid "provided he be in good standing when he dies," the certificate is proof of the good standing of the party named at the time of its issue, and such standing will be presumed to have continued, in the absence of contrary evidence. In such case, the burden is on the society to show that, by reason of his conduct, or his failure to comply with the regulations or requirements of the society, the deceased had lost his good standing.[4]

Proof that the society recognized the decedent as a member up to a short time before his death, in connection with the presumption that all persons follow such laws, rules and regulations as they are subject to, is sufficient evidence of the good standing of decedent to maintain the action.[5]

When the by-laws of a society provide that the quarterly dues shall be payable "on or before the first meeting in each quarter" in order to show that the member is not in good standing by reason of not having paid his dues for a certain quarter, it must be shown that a meeting has been held since

[1] Supreme Lodge v. Schmidt *et al.*, 98 Ind. 374; Erdmann v. Order Herman's Sons, 44 Wis 376; Supreme Lodge v. Abbott, 82 Ind. 1.

[2] Georgia Masonic Mutual v. Gibson, 52 Ga. 640.

[3] Siebert v. Chosen Friends, 23 Mo. App. 268.

[4] Supreme Lodge v. Johnson, 78 Ind. 111.

[5] Lazensky v. Supreme Lodge K. of H. 31 Fed. Rep. 592.

the commencement of the quarter. Testimony that the society holds meetings every week is not enough.[1]

§ 377. Admissibility of declarations of member. The question of the admissibility of declarations of a member of a society, made after the issuing of his certificate, arose in the case of Supreme Lodge, K. of H. v. Schmidt, 98 Ind. 379. The court says: "Hanson was also called as a witness, and counsel for the defendant offered to show by him that between the 21st and 25th days of August, 1879, he accompanied Schmidt, the decedent, to the office of the supreme master of exchequer, at the time he went to see about getting reinstated, and that he, Schmidt, there admitted in the presence of Stumph that he had received notice of assessment No. 8, in contest, that he had not paid that assessment, and that he had been suspended for its non-payment. If this action had been upon an ordinary life insurance policy the decision of the court excluding what was proposed to be proven by Hanson would have been fully sustained by the authorities. This is conceded by counsel for the appellant, but it is insisted that the provision in the certificate before us, authorizing Schmidt to make a different disposition of the proceeds by "will or otherwise" takes it out of the rule applicable to ordinary life insurance policies, recognized as above, and requires us to consider Schmidt as having been the real owner of the certificate until the time of his death; that Schmidt being thus the real owner of the certificate at the time fixed in the offered evidence, it was competent to prove admissions made by him affecting its validity as a chose in action. * * * * From the time of the issuance of the certificate until Schmidt's death," (the beneficiaries named in the certificate) "were, in legal contemplation, the owners of it, subject only to the right of Schmidt to ultimately substitute other beneficiaries by will, or in such other manner as the rules and regulations of the order might permit. But this right to ultimately substitute other beneficiaries did not empower Schmidt to destroy the value of the certificate in the hands of the appellees by merely hearsay or irrelevant admissions concerning matters in issue between other parties. Schmidt having never exercised the right of substitution reserved to him, we are justified is assuming that he never intended to exercise it, and that as between the

[1] Mills v. Rebstock, 29 Minn. 380.

appellees and the order, the former have been the absolute owners of the certificate ever since it was issued. We are, consequently, unable to hold that the alleged admissions of Schmidt to Hanson in the presence of Stumph, were any more admissible as evidence in the case in hearing than they would have been in an action upon a life insurance policy issued in the usual form. In actions upon life policies, or certificates of membership issued by mutual societies designed to secure the payment of moneys to those dependent upon its members after the death of such members, courts should construe the rules and regulations of such societies liberally to effect the benevolent objects of their organization, and that doctrine of construction is applicable generally to rulings on questions of evidence, as well as in other respects.[1]

In an action by a beneficiary upon a certificate issued to a member of a mutual benefit society, an application for reinstatement, made by the member, is not competent evidence to prove the fact of his suspension. Nor is a statement made by the member, that he was suspended for the non-payment of an assessment, competent evidence to prove that fact.[2]

§ **378. Proofs of death.** The furnishing of proof of death of the member is usually made a condition precedent to the liability of the society upon its certificate.

Where a by law of a mutual benefit society provides that, upon receipt of notice of death of a member, the secretary shall immediately forward to the beneficiary the proper blanks, and full instructions how to make proofs of death, and the society, upon notice of the death of a member, with a request to send the blanks and instructions as to the required proof, refuses to send the same on the ground that the decedent had failed to pay his assessments, and had ceased to be a member before his death, this refusal to send the blanks and instructions is a waiver of the preliminary proof of death.[3]

[1] Declarations of assured admissible, Kelsey v. U.S. Ins. Co. 35 Conn. 225; Aveson v. Lord Kinnard, 6 East 188; Declarations of assured inadmissible, Swift v. Mass. Mut etc., 63 N. Y. 186; Eddington v. Mut. Life etc., 67 N. Y. 185; Dilleber v. Home Life etc, 69 N Y. 256; Fraternal Mut etc., v. Applegate, 7 Ohio St. 292; Hurd v. Masonic Mut. etc., 6 Ins. L. J. 792; Mobile Life etc., v. Morris, 3 Lea 101; Washington Life etc., v. Haney, 10 Kans. 525; Penn. Mutual etc., v. Wiler, 100 Ind. 92; Valley Mut. Life Ins. Co. v. Burke 12 Ins. L J. 337.

[2] Larensky v. Supreme Lodge K. of H. 31 Fed. Rep. 592; Dodge v. Freedmans' Co., 93 U. S. 379; 1 Greenl. Ev. at section 171.

[3] Covenant Mutual etc. v. Spies *et al.* 114 Ill. 463; Kansas Protective Union v. Whitt, 37 Kan.; 14 Pac. Rep. 27; Grattan v. Ins. Co. 80 N. Y. 281.

Where proofs of death of the assured have been made, and the society retains them without suggesting any defect in the proof, and finally wholly refuses to pay the claim, it thereby waives any defect in the formal proof of death, and acknowledges that the requisite proofs were received by it. But such proof must be to such a degree formal as to show that it is intended to be the preliminary proof of death.

Where preliminary proof of death of a member has not been furnished to a benefit society as required by the contract, a refusal to pay on other grounds is a waiver of this requirement.[1]

§ **379. Proof of death continued.** Where a policy provided for due notice and proof of the death of the insured, and of the just claim of the claimant, and the society had paid the amount of the policy to a party not entitled by law to its benefits, he having presented proofs of the death of the insured to the society, and afterwards the rightful beneficiary made proof by affidavit of the death of the insured, and his own just claim, a general objection by the society to the sufficiency of the proofs is not good. The court says: "As the proofs of the death of the insured already in possession of the defendant had been accepted by them as satisfactory, there is no merit in the contention of the defendant, that the plaintiffs have failed to comply with the terms of the policy in this respect. If the defendant has not already waived any proof of death by claiming that they had paid the loss to the person entitled, they did waive further proof than the affidavit by failing to specify any grounds of objection to it in form or substance."[2] Preliminary proof of death may be waived by a mutual benefit society.[3]

Where, by the terms of the contract, the society is not bound to levy an assessment to meet a death loss, until sixty days after due proof of the death has been made, a declaration or complaint which fails to state that such proof has been made, is defective.[4]

§ **380. Actions on by-laws for benefits.** In an action against a mutual benefit society for the recovery of sick

[1] Lazensky v. Supreme Lodge etc. 31 Fed. Rep. 592.

[2] Timayenis v. Union Mutual etc. 21 Fed. Rep. 223; Wuesthoff v. Germania etc. Co., 107 N. Y. 580, overruling 52 Superior Ct. 208.

[3] Covenant Mutual etc. v. Spies *et al.* 114 Ill. 463.

[4] Taylor v. Relief Union, Mo.; 6 S. W. Rep. 71.

benefits, the burden of proof is on the plaintiff to establish a by-law, rule or custom rendering the society liable for such sick benefits.[1] An action may be maintained by a member of of a mutual benefit society upon a by-law of the society agreeing to pay benefits to members in case of sickness. In such an action, the by-law is the basis and foundation of the suit, and it is not a sufficient averment that "it is a rule of the association that every member in good standing when sick shall be entitled" etc. A mere rule is a thing that can be abrogated at the pleasure of the association, and has not the binding force of a contract between the corporation and its members.[2]

Where it is provided in the by-laws, as a prerequisite to recovery of benefits, that the member applying shall furnish a physician's certificate to the "sick committee," it must be furnished, before an action will lie to recover such benefits. The mere exhibition of such certificate to a member of such committee is not sufficient.[3]

§ 381. **Action on by-laws continued.** If an incorporated benevolent society, the by-laws of which provide for the payment of a weekly allowance to a sick member, upon the performance of a certain condition by him, refuses to fulfil its contract, the member injured thereby may at once maintain an action at law against it, where the by-laws of the society make no provision for a tribunal to decide questions arising between the society and its members.[4]

The by-laws of a society provided that a sick member on sending to the society "every week during his sickness" a certificate signed by a qualified surgeon stating his illness, "shall be entitled to a weekly allowance of five dollars." A member of the society was taken ill in another state, and sent to the society a certificate stating his illness, and signed by a person who was in fact a surgeon in attendance upon him, but who did not describe himself in the certificate as such. Accompanying the certificate was a letter from the member in which he spoke of it as the doctor's certificate. No other certificate was furnished until after his return to Massachusetts about three months later, when he furnished a certificate that he had been ill since the date named in his first certificate.

[1] Mullally v. Irish Am. Ben. Soc. 6 Pac. Rep. 78, decided by Supreme Court of California, but not reported in California Reports.

[2] Irish Catholic etc. v. O'Shaughnessey, 76 Ind. 191; Beneficial Society v. White, 30 N. J. Law 313.

[3] Harrington v. Benevolent Society, 70 Ga. 340.

[4] See §356.

In a suit upon the by-law providing for sick benefits, it was held that the first certificate was a substantial compliance with the by-laws, and entitled the member to receive an allowance for one week, and that he was not entitled to any further allowance.[1]

§ 382. Action on by-laws continued. The by-laws of an incorporated mutual benefit society provided that a member who became incapable of working, in consequence of sickness or accident, should receive from the society a certain sum per week; that he could not receive such benefit without making application in writing to the society, nor before two members appointed by the president had visited him and made a report to the society. A member of the society became ill, and was unable to work. He gave notice in writing of his illness to the society, and a special committee visited him and reported his condition to the society. On a day named, he was entitled to receive from the society a certain sum for two weeks' illness, which was afterward tendered to him. On that day, he resumed work at his regular employment, and worked for two consecutive days, receiving his wages therefor, but during the two days he was not physically in a fit condition to work, and could only perform light work, and not even that without unreasonable, excessive and harmful exertion. During the time he was so employed, a committee of the society visited his house, and afterwards reported that he had returned to work, and the committee was discharged from further duty. At the expiration of the two days, he suffered a relapse, and was unable to work for a period sufficient to make four weeks from the date of his first illness by including said two days in the computation. No notice of his illness was given to the society after the day when he so resumed work, and the society took no action thereon. He then brought an action for sick benefits. The court says: "The fact of having done some work is not the final test. The by-law must have a reasonable construction. A man recovering from an illness of about three weeks duration may justly be deemed to be 'incapable of working' although by unreasonable, excessive and harmful effort and exertion, he succeeds in doing light work for two consecutive days, and then, by reason thereof, suffers a relapse. That the recurrence of the plaintiff's illness was a relapse caused by

[1] Dolan v. Court Good Samaritan, 128 Mass. 437.

excessive and harmful exertion, might fairly be inferred. The fact that he received wages for those two days is immaterial. But one report from the committee for a continuous illness is contemplated in the by-laws. Such report having been made, the plaintiff was not affected by what they did afterwards, or by their discharge."[1]

§ 383. **Action on by-laws continued.** The constitution of a mutual benefit society provided that a member "permanently disabled from following his or her usual or other occupation" was entitled to a benefit, and in another section defined such disability as one which should "permanently prevent the member from following any occupation whereby he or she can obtain a livelihood." In construing these provisions, it was held that the words "or other occupation" in the first mentioned section, could not be held to mean "or other of the same kind," and the definition in the latter section was conclusive against one, who, disabled in his own trade, had been working at another totally dissimilar business, against one who, disabled from following the occupation of a barber, is able to run a restaurant, or clerk in a store.[2]

[1] Genest v. L'Union St. Joseph, 141 Mass. 417.

[2] Albert v. Order of Chosen Friends 34 Fed. Rep. 721; See Sec. 173 p. 208. See sec. 3, p. 4.

Action on the Contract of the Society.

Part III.

SEC. 384. Plans and schemes of mutual benefit insurance.
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SEC. 408. Ordinary legal remedy for breach of contract.
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SEC. 412. Measure of damages in certain cases.

§ 384. **Plans and schemes of insurance.** Each mutual benefit society has its own form of contract of insurance, differing in detail from the others. They seem, however, to be formed upon three general plans.

First. Where the society agrees, upon certain conditions, to pay a certain sum of money on the death of a member.

Second. Where the society agrees to pay, upon certain conditions, as many dollars as there are members of the society in good standing at the time of the death of a member.

Third. Where the society agrees, upon certain conditions, on the death of a member, to levy an assessment upon its

members, of a certain sum of money, and to pay the proceeds of such assessment to the beneficiary of the member.

§ 385. **Actions on certificates under first plan.** Actions upon certificates issued under the first plan, where the agreement is to pay a fixed sum of money to the beneficiary of a member dying in good standing, are governed by the same principles which obtain in suits upon ordinary insurance policies.

§ 386. **Actions on certificates under second plan.** Concerning actions upon certificates issued under the second plan, where the society agrees to pay to the beneficiary of a member dying in good standing as many dollars as there are members of the society at the time of his death, little need here be said. There is nothing in such a contract suggestive of the idea that defendant's liability is dependent upon collections received from an assessment, and a complaint or declaration upon it states a cause of action, although it neither alleges the actual receipt of money upon an assessment to meet the loss, nor a neglect to make such assessment.[1]

Parol evidence is admissible to show the number of members of the society at the death of the deceased member, in order to ascertain the sum recoverable under the contract.[2]

§ 387. **Actions on certificates under third plan.** Where the society agrees, upon the death of a member in good standing, to levy an assessment of a certain sum of money on each member of the society, and to pay the proceeds thereof to the beneficiary of the member, many questions may arise. In the first place, let us inquire whether *mandamus* is the proper remedy for a breach of the contract.

§ 388. **Mandamus as a remedy.** In the lower courts, the point is often made that the proper proceeding upon such a certificate of membership is neither by suit at law nor bill in equity, but is by *mandamus* to compel the officers of the society to make an assessment. But this point has seldom been pressed in courts of last resort, for an investigation readily shows that it is not well taken. It is elementary that a court has no jurisdiction by *mandamus* to compel the performance of executory contracts, and especially is this the case, where, in the performance of such contracts, discretion

[1] Neskern v. N. W. Endow. & Legacy Ass'n, 30 Minn. 406.

[2] Benefit Society v. Flietsam, 97 Ill. 474.

and judgment must be exercised.[1] It is also laid down as the rule, both in this country and in England, that, where a party has another specific legal remedy, he may not resort to a proceeding by mandate. It has been held, upon this ground, that the beneficiary may not resort to such a proceeding.[2]

In Burland v. N. W. Mut. Ben. Association 47 Mich. 427, in discussing the propriety of *mandamus* as a remedy in a case of contract between parties, and a breach thereof, the court says: "Such a writ does not purport to adjudge or decide any right. It is rather in the nature of an award of execution than of judgment. It is the mode of compelling the performance of acknowledged duty or enforcing an existing right rather than deciding what that right or duty is. The award is no finality. It concludes nothing. If the writ is denied, the relator cannot have error, and if granted, the award could not be pleaded in law. If the writ were issued in this case, it could not direct the payment of any specific amount, as that is dependent upon the number of certificates in force at a given time, which must first be ascertained, so that a question might arise whether it would not be necessary to issue several in order to give the party adequate relief. But why should this be done while the defendant company denies all and any liability because of fraud or false representations? Here is a question that should first be settled, and manifestly an ordinary trial in a court of law is the proper way of so doing. The argument that the company has no funds to pay a judgment, if one is recovered, can be no reason for issuing the writ. If it were, this court might be under the necessity of issuing it in the case of insolvent debtors generally. Indeed, it may be said that a private corporation cannot by the peculiar form of contract it enters into with individuals, nor because of its insolvency, or both, avoid an action at law upon a breach of its agreement, or confer original jurisdiction upon this court for the collection of money demands."

In Bates v. Detroit Mutual Benefit Association, 47 Mich. 646, application was made for a *mandamus* to compel an assessment. The application was denied, as the court was of the opinion that *mandamus* was not the proper remedy.

[1] People *ex rel.* v. Dulaney *et al.* 96 Ill. 503; County of St Clair v. The People, 85 Ill. 396; High Ext. Rem. at section 321.

[2] Excelsior Mutual Aid, etc., v. Riddle, 91 Ind. 84; see State v. Turnpike Co., 16 Ohio St. 308; State v. Railroad Co., 43 N. J. Law 505; State v. Bridge Co., 20 Kan. 404; State v. Trustees of Salem Church, Ind.; 16 N. E. Rep. 808.

In a suit upon a fire insurance policy issued by a mutual insurance company, which, in substance, provided that the loss as adjusted should be paid by assessments upon its members, it was held, that, as the society had adjusted plaintiff's loss, and had neglected to make the necessary assessment within the time stipulated in the contract, plaintiff was entitled, under sections 3375 and 3381 of the Code of Iowa, to an order of *mandamus* to compel the levy of such assessment.[1]

§ 389. **Remedy in equity.** It has been held that courts of equity have jurisdiction to enforce specific performance of those contracts of insurance which provide, in substance, that, upon the death of a member who has complied with all the requirements of the contract upon his part to be performed, the society will levy an assessment upon its members, collect and pay over to the beneficiary the proceeds thereof. The grounds of such equitable jurisdiction are not discussed at length in any of the cases holding this doctrine, though the relation of trustees and *cestuis que trustent* is, in a measure, assumed, and the inadequacy of the legal remedy seems to be the foundation of the decisions.

Ordinary mutual life insurance companies are not, in any sense, trustees in their relations to their policy holders.[2] It has, however, been held that a mutual benefit society stands as a trustee of the fund which it collects for the beneficiary entitled thereto.[3] Whether relations of trust exist between the society and its officers, or between the society and its members need not here be inquired into, but it would certainly be difficult to define any general fiduciary relation between the society and a beneficiary of one of its contracts of insurance. When we consider that the contract is unilaterial, binding upon the society in case the member desires to continue the contract, but not enforceable against a member refusing or neglecting to pay; that so many courts have held the legal remedy to be practicable and adequate; that assumed fiduciary relations between the parties are illusive, intangible and incapable of satisfactory definition, we may be in doubt as to equitable jurisdiction in such cases. Nevertheless, because of the peculiar provisions of the contract of insurance, and the power

[1] Harl v. Mutual Fire Insurance Co. Iowa; 36 N. W. Rep. 880.

[2] Taylor v. Charter Oak etc., 9 Daly 489; Bewley v Equitable etc. Society, 61 How. Pr. 344; Cohen v. N. Y. Mutual etc., 50 N. Y. 610.

[3] Relief Association v. McAuley, 2 Mackey, D. C. 70; Covenant Mutual Benefit Association v. Sears, 114 Ill. 108; In re Protection Life Ins. Co, 9 Bissell 188; Wilber v. Torgerson, 24 Ill. App. 119.

of a court of equity to give adequate and direct relief in the enforcement of its provisions, and because of the uncertain and narrow relief by execution on a judgment at law, it is certain that such contracts possess the essential elements and incidents which give to courts of equity the jurisdiction to compel their performance, or, to put it in another form, to issue a mandatory injunction to compel the society to make an assessment.

§ **390. Remedy in equity continued.** A society issued to a member a certificate by which it agreed, upon his death, to make an assessment on each member of the society, and to pay the proceeds of such assessment, not exceeding the sum of twenty-five hundred dollars, to the beneficiary, etc.

After the death of the member, the beneficiary brought an action at law upon the certificate, but the Supreme Court of Iowa, Beck, J. dissenting, held that, upon the refusal of the defendant to make the assessment and pay over the proceeds of such assessment, an action at law could not be maintained for the recovery of such sum as it might be supposed would have been realized if the assessment had been made; that the remedy of the beneficiary was by a proceeding to compel the society to make the assessment.[1]

In Newman, Trustee v. Covenant Mut. Ben. Ass'n., Iowa; 33 N. W. Rep. 662, decided by the same court three days after the case of Ranisbarger v. Union Mut. Aid Ass'n. *supra*, the court held that an action at law was properly brought on such a contract, but that in such an action nominal damages only could be recovered.

A bill in chancery was brought to recover the benefit fund agreed to be paid by the terms of a certificate of membership in a society. Objection was taken to the jurisdiction of the court, that there was an adequate remedy at law. The Supreme Court of Illinois, in passing upon this question, says: "The certificate of membership does not contain any contract to pay to the beneficiaries $5,000.00, or any sum, absolutely, but to levy assessments, ratably, upon all members holding certificates in force at the death of decedent, for an amount not less than the limit of the certificate, and to pay over the sum so collected on such assessments, less the collection costs. As the corporation is not organized for pecuniary profit, has no surplus, and relies entirely upon the mortuary assessments made upon each death

[1] Ranisbarger v. Union Mut. Aid Ass'n., Iowa; 33 N. W. Rep. 626; Bailey v. Mut Ben. Ass'n. Iowa; 27 N. W. Rep. 770.

for the payment of benefits to the beneficiaries of a decedent, it would be difficult to realize anything by execution. And the association stands as a trustee of a fund in the hands of its numerous members, but belonging to the beneficiaries, which can be called in, by assessment, for their use. It would seem, then, that a court of equity might properly be resorted to as being capable of affording a more adequate remedy, by directing a specific performance of the contract of the defendant by the levying of the proper assessments."'[1]

Courts of equity have no jurisdiction in suits against mutual benefit societies *for damages* for refusing to make the assessment stipulated for in its certificate of membership.[2]

§ 391. **Contract to resort to equity.** While parties may not, by contract in advance, waive all their remedies for a breach of a contract, yet they may waive some of them, and may stipulate in advance which remedies only may be pursued in case of its breach. The only limitation upon this abridgment of remedies is that the one stipulated to be pursued shall be capable of affording substantial relief. Such a waiver or stipulation must be in express and unequivocal terms. A society issued a certificate of membership in which it agreed that, if the member died in good standing, it would make an assessment upon the surviving members and pay over the proceeds of the assessment, not exceeding $5000.00, to the beneficiaries of the insured. The certificate contained, among other conditions, the following: "The only action maintainable upon this policy shall be to compel the association to levy the assessments herein agreed upon, and if a levy is ordered by the court, the association shall be liable under this policy only for the sum collected under an assessment so made." In an action at law upon the policy, Judge McCrary said: "If the policy provided in clear terms that the beneficiaries shall, in case of death, receive a particular sum to be recovered by assessment, or to be paid by the company after making an assessment, if the company had refused to make an assessment, I am inclined to the opinion that an action at law might be maintained, especially if there was no provision in the policy itself forbidding it. But since the policy here does not fix upon the company an absolute liability to pay any particular sum, but only a liability to pay the proceeds of a particular

[1] Benefit Association v. Sears, 114 Ill. 108.

[2] Newman, Trustee v. Covenant Mutual etc., Iowa, 33 N. W. Rep. 662.

assessment, to be levied in a particular way; and since it further provides that the company shall only be liable in a proceeding to compel it to make the assessment, we are of the opinion that an action at law cannot, at least in the first instance, be maintained. However inequitable such a contract may be, it is undoubtedly within the power of the parties to enter into it, and, therefore, we think that the only remedy, according to the practice of this court, and under the terms of the policy, is by a proceeding in chancery to compel a specific performance."[1]

§ **392. Action at law.** Though a beneficiary may resort to equity, and seek a mandatory injunction to compel the society to make an assessment, upon its neglect or refusal to do so, the decided weight of authority is to the effect that he may, if he prefer, bring an action at law for damages for breach of the contract. Nearly all of the adjudicated questions on the subject of mutual benefit insurance have arisen in suits at law. It is true that in few of these suits at law is there any discussion of the question as the proper form of action, or the proper forum for the adjudication of the rights and remedies of the parties. The fact that few of these cases discuss these questions, may, at first impression, seem to detract from their force as authorities in favor of the proposition that an action at law is a proper and adequate remedy, but the general acquiescence of the bench and bar in this proposition is certainly a strong argument in favor of its soundness.[2]

[1] Eggleston *et al.*, v. Centennial Mutual Life Association, etc., 18 Fed. Rep. 14; 19 Fed. Rep. 201.

[2] The following are some of the cases in which it is decided, or assumed that an action at law for damages is a proper and adequate remedy for a breach of the agreement to levy an assessment and pay over the proceeds, and in which the questions arising in the record are discussed and decided upon that theory.

Curtis v. Mutual Benefit Life Co. 48 Conn. 98; Miller v. Georgia Masonic etc., 57 Ga. 221; Covenant Mutual Benefit Association v. Hoffman, 110 Ill. 603; Suppiger v. Covenant Mutual etc., 20 Ill. App. 595; Life Association v. Hagler, 23 Ill. App. 457; Mutual L. & A. Society v. Miller, 23 Ill. App. 341; Mandego v. Cent. Mut. Life Ass'n., 64 Ia. 134; Mutual Endow. Association v. Essender, 59 Md. 463; Yoe v. Masonic Mutual etc., 63 Md. 86; Earnshaw v. Sun Mutual Aid, etc., Md. 11 Cent. Rep. 508; Bates v. Mut. Ben. Ass'n., 47 Mich 646; 17 N. W. Rep. 67; Burland v. N. W. Mut. Ben. Assn., 47 Mich. 427; Stewart v. Lee Mutual etc., Ass'n., 64 Miss. 499; 1 Southern Rep. 743; Taylor v. Relief Union, Mo.; 6 S. W. Rep. 71; Freeman v. National Ben. Soc. 42 Hun (N. Y.) 252; Baker v. N. Y. State Mut. Ben. Ass'n. 27 N. Y. Weekly Dig. 91; Fairchild v. North Eastern Mut. Life Ass'n., 51 Vt. 613; Hankinson v. Paige, 31 Fed. Rep. top page 189.

§ 393. Pleading, breach of promise to pay, etc. Where the contract of the society is to pay a specific sum of money, it is sufficient to aver, in a complaint or declaration on the contract, a breach of the promise to pay that sum. But where the contract provides that the society shall pay as many dollars, or as many times a specific sum, as there are members of the society in good standing at the time of the death of the member, it is evident that, in addition to an averment of a breach of the contract to pay, there must be an allegation of the number of such members, in order to give the *data* from which the amount of the liability may be computed. The want of such allegation would, doubtless, be cured after verdict. It is also evident that, where the contract provides merely that the society shall levy an assessment upon its members and pay over the proceeds thereof to the beneficiary, it is not sufficient to aver a breach of the promise to pay. The facts must be alleged, which raise the promise to pay, and it is necessary to aver, in a complaint or declaration on such a contract, either that an assessment has been levied and a certain amount collected thereon, which the society refuses to pay, or that the society has neglected or refused to levy an assessment upon its members and to pay to the plaintiff the amount that would have been realized from such an assessment. The want of such an averment is a fatal defect on demurrer, on motion in arrest of judgment, or when the question is raised for the first time in the court to which an appeal has been taken, for there is not only an omission to state any facts to show the ground of the society's liability, but there is also a want of *data* to show the amount of such liability, or from which it may be computed.

§ 394. Breach of promise to pay continued. Where, however, the contract provides that the society shall levy an assessment upon its members and pay to the beneficiary the proceeds thereof, *not exceeding a certain sum*, there is a division of authority as to whether it is necessary to allege either a neglect to levy such asssssment, and the amount that would have been realized had it been levied, or that an assessment had been levied and the payment of the proceeds refused. One line of authorities holds that, as the society has set the limit to its liability, and held out the hope that so large an amount may be realized from an assessment, the beneficiary may declare as upon an express promise to pay the speci-

fied amount, leaving the society to aver, as a matter of defense, the facts which show the amount of the liability to be, in fact, less than that limit.[1] The other line of authorities holds that as the maximum amount is not absolutely promised, but is merely mentioned as the limit of liability, the rule of pleading is not changed by such words of limitation.[2]

It has also been held, in another line of cases, that to entitle plaintiff to recover in an action at law for damages, he must allege in his declaration and show on the trial that the society has levied an assessment upon its surviving members to pay the death loss, has collected the amount of such assessment, and has failed to pay the sum so collected; that it must appear both in the declaration and in evidence that the society has in its hands the money collected by assessment, which it ought to pay to plaintiff as beneficiary entitled to it; that if the association has failed to make the required assessment, or, having made the assessment, has neglected to collect the same, plaintiff's remedy is in some other form of action or proceeding.[3]

§ 395. Breach of promise to pay—Evidence. A certificate of membership in a mutual benefit society, providing that on the death of a member and due proof thereof, etc., an assessment shall be levied upon the members holding certificates, and that the amount collected from such assessment shall be paid to his beneficiaries, not to exceed a certain sum, is not admissible in evidence under a declaration which avers a promise by defendant to pay a specific sum. The court says: "The certificate of membership read in evidence was clearly inadmissible under the declaration, which does not aver that any assessment was made, or the number of members liable to assessment, or the amount that could have been collected by such assessment, or aver any facts showing a duty by defendants to make such assessment, but avers a promise by defendants to pay plaintiffs a specific sum of $4,000. The certificate read to support this averment is a

[1] Elkhart Mut. Aid v. Houghton, 103 Ind. 286; Lueders' Ex'r v. Hartford Life, etc., 12 Fed Rep. 465; 4 McCrary 149; Kansas Protective Union. etc., v. Whitt 37 Kan.; 14 Pac. Rep. 275; see Suppiger v. Covenant Mut. Ben. Ass'n, 20 Ill. App. 595; see § 401.

[2] Curtis v. Mutual Benefit, etc., 48 Conn. 98; Earnshaw v. Sun Mutual Aid, etc., Md; 11 Cent. Rep. 508; Taylor v. Relief Union, Mo.; 6 S W. Rep. 71; Life Association v. Hogler, 23 Ill. App. 457

[3] Smith v. Covenant Mut. Ben. Ass'n, 24 Fed. Rep. 685; Newman Trustee v. Covenant Mut. Ben. Ass'n, Iowa; 33 N. W. Rep. 662; Tobin v. Western Mut. Aid Soc., Iowa; 33 N. W. Rep. 663; see §§390, 402.

conditional promise to pay the amount collected of members by assessments, less cost and expense of collection. There is a fatal variance between the averments and the proof offered to sustain them."[1]

§ 396. Averment of demand for assessment. It is not necessary, in order to lay the foundation of a recovery, that the plaintiff shall make, or aver that he has made, a demand upon the society for an assessment upon its members to pay the death loss. The duty to make an assessment is imposed upon the society by contract, and if the society fails in this duty, the beneficiary has the right to his proper remedy for such failure.[2]

The furnishing of satisfactory proof of the death of the member to the society, according to the provisions of the certificate issued to him, should be held to be a demand for payment, and, impliedly, a demand upon the society to procure the necessary fund by an assessment if need be.[3]

§ 397. Plea setting up that no fund has been raised by assessment. In an action of assumpsit on a certificate of membership, the society pleaded that it was provided in its by-laws that the money to be paid on the death of any member should be produced by an assessment of $2.00, to be levied upon each of the remaining members of the series of membership to which the decedent belonged, and that no such assessment had been levied or ordered. The court said: "This plea is bad, as it is the duty of the officers of the defendant to order an assessment on the death of a member, and to permit the defendant to set up the failure of duty of its officers, as a reason for defeating the plaintiff's action, would be to allow it to take advantage of its own wrong."[4]

By a certificate of insurance is sued to a member of a society, there was to be paid to the beneficiary, if living * * * *, in ninety days after due proof of the death of said member, a sum equal to the amount received from a death assessment, but not to exceed three thousand dollars. The fourth condition thereof provided that "the death claim under this contract shall be payable in ninety days, after satisfactory proof

[1] Life Association v. Hagler, 23 Ill. App. 457.

[2] Smith v. Covenaut Mutual Ben. Ass'n, 24 Fed. Rep. 685; Kansas Protective Union v. Whitt, 37 Kan. 14 Pac. Rep. 275.

[3] Freeman v. National Benefit Society, 42 Hun 252.

[4] Birnbaum v Passenger Conductor's, etc., 15 Weekly Notes of Cases (Pa) 518; See Hankinson v. Paige, 31 Fed. Rep. 184-188-189.

of the death of the said member shall have been furnished," as therein provided. In a suit by the beneficiary, after the death of the member, the society objected to the right of the plaintiff to maintain the action to recover the amount, upon the ground that the promise to pay was contingent, not absolute, as payment was to be made out of a special fund, the death fund, to be procured from an assessment of the members of the society, and that the beneficiary was restricted to the fund thus specified; and, further, that there was no proof of the existence of such fund. The court says: "It may well be that the beneficiary would be thus restricted, in case of due effort by the society to assess its members liable to assessment therefor. An omission to make an assessment which, if made, would produce a fund equal or greater than the claim, would create an obligation against the society, the same as if it had the fund on hand from which to make payment. It could not lie by, and omit to put into operation the means possessed by it to obtain the fund, and omit payment because of its own neglect of duty. This would be to take advantage of its own wrong, and it would operate as a fraud on the beneficiary under the certificate, since the obligation to raise the fund by assessment, when shown to be adequate for that purpose, would take the place of the fund in determining the question of liability. So, too, the furnishing of satisfactory proof of the death of the member of the society, according to the provisions of the certificate issued to him, should be held to be a demand for payment, and impliedly would also be a demand upon the company to procure the necessary fund by assessment if need be. It should be further observed that according to the fourth condition upon which the certificate was issued and accepted, payment was to be made absolutely in ninety days after satisfactory proof of the death of the member was duly furnished to the society. So, too, the provision in the body of the certificate, that payment should be made of a sum equal to the amount received from a death assessment, not to exceed the sum specified, in ninety days after due proof of the death of the member was given, implies an obligation upon the company to proceed and make the necessary assessment to raise the fund within the time during which it was provided that the claim should remain in abeyance. For all these reasons, the objection to recovery, on the ground that there was no proof of the existence of a death fund, must be held of no avail."[1]

[1] Freeman v. National Benefit Society, 42 Hun (N. Y.) 252.

§ 398. Evidence, effect of collection of assessment by society. In an action on a certificate of membership, it appeared in evidence that the society had levied an assessment upon its members and realized the benefit fund with which to pay plaintiff's claim. The society offered to show the invalidity of the plaintiff's claim by proving the falsity of certain representations made by the member upon procuring the certificate, which representations were made a part of the contract. The evidence was excluded, under the objection of the society, upon the ground that, as the society had acquired the money sought to be recovered, by virtue of assessments levied upon and paid by its members for the purpose of paying the claim, it thereby became the agent of its members for the purpose of paying the money upon the claim, and had no right to contest its validity or withhold the payment of the money. But, upon appeal, it was held that the court erred in so excluding the evidence; that it was the right and duty of the society to protect its members and the benefit fund from all invalid claims.[1]

§ 399. Evidence of amount that might have been realized by an assessment. In Freeman v. National Benefit Society, 42 Hun (N. Y.) 252, proof was given showing *prima facie* that an assessment upon the members liable to contribute to the death fund, would have been adequate to the payment of the loss sued for. This proof was the report of the society made to the state insurance department only a few days after the death of the member. The evidence was objected to, as not the best evidence of the facts stated therein; and it was claimed that the books of the society should have been produced. The court says: "The report so made was, however, of equal dignity and certainty with the records of the society. It was made up by the society from its records—indeed, was itself a record required by law to be made by the society, and filed in the insurance department as a record. It was, therefore, competent evidence of the facts therein stated and certified, and the evidence of (a witness) went merely to calculations in elucidation of those facts, in connection with the table of the defendant's assessment rates, which evidence and table, it seems, were received as proof without objection. The report to the insurance department, with the other proof above referred to, made a *prima facie* case against the defendant on

[1] Mayer v Equitable Reserve Fund, etc., 42 Hun (N. Y.) 237; See also Swett v. Citizens Mutual, etc., 78 Me. 541; 7 Atl. Rep. 394.

the point of its ability, with due diligence, to raise a death fund sufficient to answer the claim in suit; and no proof whatever was given or offered to gainsay such *prima facie* case. If it might have been the case, as is suggested by the defendant's counsel, that all persons who were members of the society December 31, 1885, when the report to the insurance department was made, were not also members when Darrow (the deceased member) died, but twenty days previously; and that the members named in the report may not have been solvent and able to pay an assessment if one had been made; or, that each and every assessment would have been paid if made, these were matters to be shown by the defendant against what was fairly inferable from the case as made by the plaintiff on the evidence submitted. The report was made during the time within which there should have been an asessment to meet and answer the plaintiff's claim. It was, therefore, to be inferred, in the absence of all proof to the contrary, that it contained the facts constituting a proper and adequate basis therefor."

§ **400. Evidence continued.** Where each notice of an assessment contained a statement of the number of members liable—as for instance,—"We have now eleven hundred members and are adding thereto daily."—"We have eleven hundred and eighty-five members" etc., the court held such statements admissible to show the number of members; and, it being shown that such statements were made only a short time before the death of a member, the court held that this evidence had a tendency, at least, to prove that, at his death, there were as many as one thousand members, and was properly submitted to the jury for that purpose.[1]

Parol evidence is admissible to show the number of members in good standing, in order to ascertain the sum recoverable under the contract.[2]

The number of certificates of membership which have been issued by a society is prima facie evidence of the number of members in good standing, and the burden is on the society to show that any persons, to whom certificates of membership have been issued, have ceased to be members by forfeiture,

[1] Fairchild v. North Eastern Mutual Life Association. 51 Vt 613. In this case the certificate provided for an assessment of one dollar on each surviving member to pay the death loss, but also provided that the amount to be paid to the beneficiary should not exceed one thousand dollars.

[2] Benefit Society v. Flietsam, Adm'r 97 Ill. 474.

suspension, or otherwise. It has peculiarly within its possession the means of showing such facts, and to require a plaintiff to prove a negative in case of each person who has been received into membership,—that such person had not been suspended, or had not forfeited his membership, would be unreasonable and impracticable.[1]

§ 401. Burden of proof. Where the contract provides that the society shall pay as many times a certain sum of money as there are members at the time of the death of the member insured, or where it merely provides that an assessment shall be levied upon the surviving members and the proceeds thereof paid to the beneficiary, the burden is on the plaintiff to prove by proper evidence the number of members of the association, or the amount that would have been realized from the assessment.

Where the contract provides, in substance, that an assessment shall be levied upon the surviving members, and the proceeds thereof, *not exceeding a certain named sum*, shall be paid to the beneficiary, the society is, according to some authorities, *prima facie* bound to pay the maximum amount of its liability as specified in the contract, and the burden is on the society to prove that a less amount would have been realized by an assessment.[2]

In Elkhart Mutual Aid etc. v. Houghton, *supra*, the court says: "The certificates each provide that upon the death of the assured, appellee is entitled to $1,000, or so much as may be realized from one assessment, etc. The undertaking in each certificate is for $1,000, unless an assessment will not produce that much. That an assessment would not produce $2,000 we think is a matter of defense to be set up by appellant. It would be difficult, if not impossible, for appellee to know how many members of the association there are. The books of the association doubtless show the number. These books are in the possession and custody of the officers of the association. If the members are such, in number, that an assessment would not produce $2,000, that fact is known to the officers of the association, and they should set it up in an answer, and make good the answer by proof, as they readily could, if true."

[1] Neskern v. N. W. Endow. & Legacy Ass'n., 30 Minn. 406.

[2] Elkhart Mut Aid v. Houghton, 103 Ind. 286 N. E. Rep.; Lueders' Ex'r. v. Hartford Life etc. 12 Fed. Rep. 465; 4 McCrary 149; Kansas Protective Union etc. v. Whitt *et al.* 37 Kan; 14 Pac. Rep. 275; See Suppiger v. Covenant Mut. Ben. Ass'n., 20 Ill. App. 595.

In Lueders' Ex'r v. Hartford Life etc., *supra*, it is said: "Despite some decisions to the contrary, this court cannot hold otherwise than that when suit has to be brought, the recovery should be for the maximum insured, unless the defendant shows by pleadings and proof that said sum should be reduced. * * * In the absence of any proof to the contrary, the sum recoverable should be against the corporation for the maximum insured. Any other rule would make this insurance scheme a mere delusion and snare."

§ **401 a. Burden of proof continued.** An intimation of this doctrine is contained in the case of The Covenant Mutual Benefit Association v. Hoffman *et al.*, 110 Ill. 603, where the Supreme Court of Illinois says: "It was provided that upon due notice of the death of the holder of the certificate being filed with the secretary of the association, showing the member had in all respects complied with the conditions of the certificate, an assessment would be levied upon all the members holding certificates in force at the time of the death of such member, for the full amount named in their respective certificates, and the sum so collected on such assessments, less all amounts which might be added for expenses and collection costs, the association agreed by the certificate to pay, or cause to be paid, as a benefit, * * * * ; but in no case should the payment under the certificate exceed $5,000.00. * * * * Across the face of the certificate issued to the deceased was printed in large figures, "$5000.00," which would seem to indicate that was its value."[1]

In Kansas Protective Union v. Whitt *et al.*, 37 Kan.; 14 Pac. Rep. 275, the court says: "The undertaking on the part of the Union was to pay the beneficiary of Whitt, after his death, $2,000.00, but not to exceed 75 per cent. of the amount of the assessment, if the amount exceeded $2000.00. The plaintiff in error had charge of these accounts, and it knew if such sum would be realized from the assessments. The burden of proof would be upon the company to show the amount realized or collected, and not upon the plaintiffs."

But there are several authorities which hold that the fixing of a limit to the amount which the society will pay from the proceeds of the assessment, does not relieve the plaintiff from

[1] See Suppiger v. Covenant Mutual Ben. Association, 20 Ill. App. 595.

showing the amount that would be realized from an assessment.[1]

In Ball v. Granite State Mutual Aid Association, N. H.; 9 Atl. Rep. 103, it was held that in an action on a certificate of life insurance issued by a mutual benefit society, by the terms of which the plaintiff is entitled to the amount of one assessment, not exceeding five thousand dollars, he can recover nominal damages only in the absence of evidence of the amount of one assessment.[2]

§ **402. Measure of Damages.** Generally speaking, a contract of life insurance is not a contract of indemnity, and where a society agrees in its policy to pay a specific sum of money on the death of the assured, it is liable for the amount so fixed. But where a creditor takes out insurance on the life of his debtor to secure a debt, only the value of his interest in the life of the assured may be recovered.

§ **403. Nominal damages in an action at law.** When the contract provides, in substance, that, upon the death of a member in good standing, an assessment shall be levied upon the surviving members and the proceeds thereof paid over to the beneficiary, there is a conflict of authority upon the question as to the proper measure of damages in an action at law for a breach of the agreement to levy the assessment and pay the money. Some authorities hold that in such an action nominal damages only are recoverable.[3]

In Newman v. Covenant Mut. Ben. Ass'n., Iowa, 33 N. W. Rep. 662, the certificate provided that "an assessment shall be levied upon all the members holding certificates in force at the time of the death of said members, for the full amount named in their respective certificates, and the sum so collected on such assessments * * * the association agrees to pay and cause to be paid to * * * * , but in no case shall the payment under this certificate exceed $5,000." The court says:

[1] Earnshaw v. Sun Mutual Aid etc., Md.; 11 Cent. Rep. 508; Curtis v. Mutual Benefit etc., 48 Conn. 98; Fairchild v. North Eastern Mutual Life Ass'n., 51 Vt. 613; Ball v. Granite State Mutual Aid Ass'n., N. H., 9 Atl. Rep. 103.

[2] See also Fairchild v. North Eastern Mutual Life Association, 51 Vt. 613; Obrien v. Home Benefit Society, 46 Hun 426.

[3] Newman v. Covenant Mut. Ben. Ass'n., Iowa, 33 N. W. Rep 662; Tobin v. Western Mut. Aid Soc., Iowa, 33 N. W. Rep. 663; Smith v. Covenant Mut. Ben. Ass'n. 24 Fed. Rep. 685; See Garretson v. Equitable Mutual etc., Iowa,; 38 N. W. Rep. 127; where verdict for full amount limited in the certificate was permitted to stand because no question of error in assessment of damages, etc., was raised in the record.

"The theory of the plaintiff is that if the certificate has not been forfeited, and the defendant disclaims all liability to pay the claim, and refuses to make the assessment, it thereby becomes liable to pay the maximum sum named in this certificate, provided its membership was large enough to have produced such sum, if an assessment had been made, and all the members had paid their assessments. But in our opinion the plaintiff's position cannot be sustained. The extent of the defendant's obligation is fixed by the certificate of membership. The association does not agree to pay any sum from any general fund, nor does it provide any general fund. It merely agrees to levy an assessment and pay over such sum as may be collected upon it. If the company, doubting or denying its liability in a given case, refused to levy an assessment, the contract is not thereby changed, and the company's liability extended. It may be conceded that a wrongful refusal to make an assessment would be a breach of the contract. But we are unable to see how more than nominal damages could be recovered for such breach. No evidence was introduced in this case, and none could have been, showing how many members would have paid their assessment, and how many would have chosen to refuse to make payment, and suffer the only consequence of such refusal, namely, a forfeiture of their memberships, nor can either party invoke any presumptions as to how many would have paid, and how many would have refused payment. As to the wisdom or propriety of this form of insurance, or the difficulties in the way of realizing the benefit under the certificates issued, the courts have no responsibility. It is for them to enforce the contracts, according to their terms, which the parties have made for themselves."[1]

§ **404. Nominal damages continued.** In Smith v. Covenant Mut. Ben. Ass'n., 24 Fed. Rep. 685, the contract of insurance, in substance, provided that on the death of a member an assessment should be levied upon all the members, and the sum so collected on such assessments the society agreed well and truly to pay to the beneficiary, but in no case should the payment exceed the sum of twenty-five hundred dollars. In discussing the measure of damages in a suit at law upon the certificate, Dyer J., in an opinion concurred in by Justice Harlan, says: "Conceding that the heirs of the decedent are the

[1] This case is followed in Tobin v. Western Mut. Aid Soc., Iowa, 33 N. W. Rep. 663.

legal beneficiaries entitled to the benefits conferred by the certificate, what are the rights of the parties respecting a recovery upon the certificate on failure of the association to pay the death loss? The theory upon which the suit is brought is that, as in the case of an ordinary life policy of insurance, the plaintiffs are entitled to recover the full sum named in the certificate without regard to the levy of any assessment upon certificate-holders, or the collection by the association of any amount so levied. After deliberate consideration of the question, we are of opinion that this is an erroneous view of the relation and rights of the parties under the certificate. The association covenants in its agreement, not absolutely to pay the sum of $2,500, but to levy an assessment upon all members holding certificates at the time of the death of the deceased member, and to pay the sum so collected on such assessment as a benefit to the designated beneficiaries, such payment in no case to exceed the sum of $2,500. Thus it is apparent that the obligation of the association is only to pay whatever amount is collected from other certificate-holders, not exceeding the sum named. Suppose that no assessment whatever is made, or suppose, an assessment being made, nothing is collected, is the association liable absolutely for the sum named in the certificate in an action like the present? If not, what is the remedy for failure to levy an assessment, or for failure to collect the amount of an assessment actually made, but not responded to by the holders of certificates? If it appeared that an assessment had been levied, and the amount thereof had been collected, but its payment to the beneficiary refused, there would be no doubt, in the absence of other grounds of defense, of the plaintiff's rights to recover in a money action the sum so collected, not exceeding $2,500. But this state of the case is not alleged. And, indeed, it was admitted on the argument that no assessment was levied to pay this loss, and, therefore, no sum had been collected for that purpose by the association from certificate-holders. Hence the difficulties above suggested. It seems clear that the right acquired by virtue of the certificate held by the decedent was to an assessment upon all members holding certificates, and the payment of the amount collected on such assessment within a prescribed period of time, the assessment not to exceed the limit of the particular certificate. We were at first disposed to think that it was incumbent upon the plaintiffs, in any view of the case, to make a demand for an assess-

ment in order to lay the foundation of a recovery. But we are now convinced that the duty to make an assessment was imposed by the contract, and if the association failed in this duty, the beneficiaries had the right, by appropriate proceedings to compel the performance of it. Undoubtedly, a court, in such a proceeding, could enforce the discharge of that duty by compulsory measures against the officers and managers of the association, or, perhaps, through its own officers, by making the necessary assessment and collection at the cost of the association, or of the certificate-holders assessed. It is quite clear that every certificate-holder agreed to look for payment to the specific mode set out in the certificate; that is, by assessments and collections within a certain limit as to the amount to be assessed. The holders of certificates are co-members of the association, who have, in effect, agreed to insure each other, and have stipulated as to the mode in which their liability to the heirs or devisees of a deceased member may be ascertained and enforced. But this plan would be defeated altogether if such heirs or devisees could obtain a judgment against the association for the amount limited in the certificate, without regard to any assessment or any amount collected on an assessment, and enforce payment in the ordinary mode in which judgments for money are enforced. To this it may be replied that the association is liable to suit for breach of covenant if it fails to make the required assessment. This may be so. But, if so, what would be the measure of damages? To say that the measure of damages would be the amount of the certificate, with the interest from date when it should have been paid, and to give judgment therefor against the association, would be to ignore the fact that the parties have provided a specific mode for the payment of the sum named in the certificate, viz., an assessment against and collection from the living members. The ordinary life policy rests upon the promise of the company to pay the sum therein named. A policy-holder in such a company is under no obligation to pay anything for the benefit of the holders of other policies. Here the insured pays seven dollars to insure a member and agrees to meet mortuary assessments from time to time, as set out in the conditions of the certificate. The association does not contract absolutely itself to pay the sum named in any certificate, but, as we have seen, only that it will assess the living members, and pay over, within a certain time the sum collected on such assessment. * * * * * To maintain this action it must appear that the

association has in its hands the money collected by assessment, which it ought to pay to the plaintiffs as the beneficiaries entitled to the same."

§ 405. Substantial damages in an action at law. The opinions of the Supreme Court of Iowa, Justice Harlan, and Judge Dyer are of great weight in determining such questions, and they have certainly covered the ground thoroughly in the presentation of the arguments in favor of the position assumed by them in these decisions. When the language of these opinions has been quoted, all has been said that can be said from that standpoint.

But there is another line of decisions holding that substantial damages may be recovered on such a contract in an action at law. As has frequently been said of contracts of insurance upon the assessment plan, the scheme is a peculiar one. While courts cannot refuse to construe and enforce peculiar contracts, it is their duty to construe them in such a way that a society may not, because of the peculiar form and terms of its contract with individuals, avoid an action at law for the breach of its agreement, and such a construction of the contract as will deprive the beneficiary of his right to damages at law for a breach thereof, is to be avoided, unless that right is waived in express terms.[6] The contract of insurance is prepared by the society in advance, and in the construction of its provisions the member and his beneficiary have no hand whatever. According to a familiar maxim of the law, the provisions of this contract are to be construed most strongly against the society. It is safe to presume that some available and substantial measure of indemnity for the breach of the agreements made by the society, was contemplated by the parties, and it is right and just to presume that they have left the law to apply its usual remedies, where the society has, in the contract, placed no limitation upon the remedy to be pursued by the beneficiary. All the authorities agree that the contract has been broken, when the society wrongfully neglects or refuses to levy an assessment, and the question under discussion is, as to whether such wrongful neglect or refusal shall be held to be a technical or a substantial breach of that contract, or, to speak more exactly, whether for such a breach of contract substantial or merely nominal damages may be recovered. To hold that

[6] Burland v. N. W. Mut. Ben. Ass'n, 47 Mich. 424; Hankinson v. Page, 31 Fed. Rep. 184.

such neglect or refusal is a technical breach of the contract for which nominal damages only can be recovered at law; and to lay down the rule as stated in the cases above quoted, namely, that the beneficiary can sue at law only for the proceeds of an assessment, and not for damages for failure to collect the proceeds in the manner provided for, gives to the parties an anomalous standing in court. For it places the parties to the contract in an anomalous and peculiar position, when the society is permitted in a court of law to say that nothing but nominal damages is due the plaintiff, because of its own default in not doing what it has agreed to do; when the society is permitted—as in Newman, Trustee v. Covenant Mutual, etc., *supra*, to set up in bar of the action, as to all but nominal damages, its own default in not making and collecting an assessment, and paying the proceeds to the beneficiary.

As sustaining the necessity of this position, it is not sufficient to say that the contract shows upon its face that the society has no funds with which to pay a judgment, or a claim against it for a death loss, except from the proceeds of assessments. Courts have nothing to do with the physical impossibility of collecting money on executions on their judgments, and if they had, insolvent debtors would be active in setting up their insolvency in resisting claims against them. If the contract is to be scrutinized upon this principle, and the adequacy of the remedy looked to, it might be answered that a court of equity might find it difficult to enforce a decree against a foreign corporation, requiring it to levy an assessment; that such a court might find it exceedingly difficult to collect anything in the manner suggested by Judge Dyer in Smith v. Covenant Mutual, etc., *supra*, namely, "through its own officers, by making the necessary assessment and collection at the cost of the association, or of the certificate holders assessed," or to enforce a forfeiture of membership in the society for non-payment of such an assessment.

§ **406. Remedy in equity discussed.** Nor can the necessity of such a position be sustained upon the theory that, while the damages at law are so uncertain and speculative as to be beyond the possibility of legal measurement, equity furnishes a direct and adequate remedy. The suggestion that equity can enforce the specific performance of such a contract presents to our minds, at first impression, an easy solution of many perplexing questions, but an inquiry into

the matter developes quite as much uncertainty, and quite as many difficulties as can possibly arise in the measurement of damages at law. The membership in a mutual benefit society is constantly changing. On the one hand, new members are constantly coming into the society, while on the other, members die from time to time, and others forfeit their membership. Suppose that a beneficiary should file his bill in equity for specific performance of the contract to levy and collect the assessment, and at the end of six months, or what is far more likely, a year and six months, at the hearing of the cause, the chancellor should find that the beneficiary is entitled to the benefit fund, and that an assessment ought to have been levied upon the surviving members,—say within three months after the death of the assured; what decree shall the chancellor enter? Shall he order an assessment upon all members in good standing at the date of such decree? Such an assessment might not be binding upon members who had entered since the death of the assured, for the by-laws of such societies usually provide, and the plan of mutual benefit insurance contemplates, that a member shall not be liable to an assessment for losses and expenses incurred prior to the date of his admission. The levy of an assessment for losses and expenses incurred prior to the admission of a member is invalid as to the new member, and non-payment of such an assessment will not work a forfeiture of his policy.[1]

§ 407. **Discussion of remedy in equity continued.** But assuming, for the further investigation of this question, that, under the insurance contract in the particular instance, the society may lawfully assess new members for deaths occuring prior to their admission into the society, will such a decree be just to the parties? If between the time when the society should have levied the assessment, and the time when the decree of the court is executed, the membership liable to assessment has decreased by five hundred members, the court is not rendering to the beneficiary the full measure of his right. And if during that time the membership of the society has increased in the number of five hundred members, the decree will give to the beneficiary a larger benefit than he is entitled to, and will operate unjustly and oppressively to the

[1] Ins. Co. v. Houghton, 6 Gray 77; Roswell v. Equitable Aid Union, 13 Fed. Rep. 840.

society. Shall the chancellor enter an order requiring the society to assess only those members who were in good standing at the date when the assessment should have been levied? If so, what account is to be taken of those members who have since that time died, or forfeited their membership? If the innocent beneficiary is not to suffer this loss, an adjustment must be made upon the same principles by which courts of law measure the damages for a breach of the contract to levy the assessment; and a court of equity has no power to assess damages for breach of the contract. What decree, then, shall the chancellor enter, which will demonstrate the alleged peculiar and adequate remedy which may be administered by a court of equity?

§ 408. Ordinary legal remedy for breach of contract. The truth is, the more we analyze this plan of insurance, and inquire into the remedial rights of the parties to the contract, the greater and more numerous seem to be the legal difficulties which present themselves. It may be that it is impossible to give to these contracts a logical and harmonious construction. Any rule which a court may lay down as to the remedial rights of the parties, seems to do violence to some provision of the contract. Under these circumstances, courts have generally brushed away as far as possible those peculiarities, anomalies and inconsistencies, which relate to matters of detail, and have attempted to effectuate the general purposes of the societies by the application of general principles of law. A reasonable construction of the above contract between the society and the member is that the beneficiary shall look to the assessment made and collected by the society, for the payment of the death loss; and an answer or plea by the society, admitting its liability, setting up the levy of an assessment, notice thereof to its members, as required by the contract, and alleging that no money had been received by means thereof, within the time stipulated for the payment of such assessments, would, certainly state a good defense, to the action. But where the society denies all liability on the contract, and refuses to make an assessment and pay the benefit fund, the law will give to the beneficiary his ordinary remedy for breach of a contract, and hold the society to respond in damages in such an amount as might have been collected by making the assessment.

It ought not to be a matter of great difficulty to show with reasonable certainty what could have been realized upon an

assessment at any given time. Members die from time to time, and assessments are made every few weeks. Some contracts provide that they shall not be levied more than once in each calendar month. Even where the contracts provide that, after proof of death of a member in good standing, an assessment shall be levied without delay, the officers of the society may exercise their discretion about waiting a reasonable time before making the assessment for the payment of the death loss.[1] Very frequently the levy is postponed for a few days, in order that notice of assessments for two or more death losses may be given at one time. It will be an easy matter to show what was realized upon an assessment made at a time when the assessment upon the particular certificate of membership sued on, might have been made. And where, by custom, or the contract of insurance, the assessments are made in one month for all death losses, of which proof has been made in the preceding month, the amount may often be reduced to a certainty.

It is practically impossible for litigation to arise on such a contract of insurance, unless the society denies its liability, and refuses to make an assessment. When the society contests the claim, it certainly cannot complain that the ordinary legal remedy is unjust or unreasonable.

§ **409. Burden of proof and measure of damages discussed.** Courts of law have in many cases taken notice of the fact that ordinary insurance companies "send their agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents," that "they pay these agents large commissions on the premiums thus obtained" etc. And, from these facts, these courts lay down certain doctrines, and among them, that the powers of an insurance agent are *prima facie* co-extensive with the business intrusted to his care.[2] Courts may with equal propriety refuse to shut their eyes to the fact that mutual benefit societies send men all over the land to establish subordinate lodges, furnishing them with printed arguments in favor of assessment insurance, as against ordinary "straight line" insurance,—wherein these societies hold out to their members, and all persons solicited, the hope and expectation that they

[1] Peoples Ins. Co. v. Allen *et al.* 10 Gray (Mass.) 297.

[2] Union Mutual etc. v. Wilkinson, 13 Wall 222.

may pay the maximum sum limited in the certificate ; and from these facts courts may reasonably and justly hold that *prima facie* they are liable for the maximum amount named in their policies, and must assume the burden of alleging and proving that an assessment would have realized a less amount. The society has set the maximum sum it will pay in any event; it has within its possession the records which show the number of members in good standing, and from which it can know with reasonable certainty how much can be realized from an assessment, and this rule cannot operate harshly or oppressively.

§ 410. Burden of proof and measure of damages continued. In Newman v. Covenant Mutual etc., *supra*, stress is laid upon the fact that no evidence could possibly be introduced showing how many members would have paid the assessment on the certificate, and how many would have refused to do so, and the court says: "Nor can either party invoke any presumptions as to how many would have paid, and how many would have refused payment."

If these insurance societies carry on business with proper method and attention to details, a society should be able to show by proper evidence, and with reasonable accuracy, the proportion of those who forfeit their membership by non-payment of an assessment, as compared with those who pay an assessment. From the fact that the contract is unilateral,—payment of an assessment not being enforceable,—it must not be assumed that a great number of members forfeit their membership at the levy of an assessment. Men enter these societies for insurance upon their lives, to secure at their death a fund for the benefit of their wives, children and other dependents, and it is reasonable to suppose that they will use every endeavor to pay an assessment, when non-payment forfeits the right of their beneficiaries to such fund. The history and growth of mutual benefit societies are a refutation of the idea that the levy of an assessment causes a great number of members to forfeit their membership.

There are strong reasons why a beneficiary may invoke presumptions as to how many members will pay and how many will refuse payment. When a man becomes a member of a society, and enters into a contract of insurance for the benefit, after his death, of those who are dependent upon him, he does so upon the faith that the society has the ability to carry out

its part of the contract. The society has presented itself to the world as an insurance organization. In the printed matter which it carefully circulates, it reminds the reader of his duty to provide for those dependent upon him, by insurance upon his life, and recommends the scheme adopted by it, as the best method by which men may accomplish that object. When a loss has occurred upon its contract, a society should not be heard to argue that its means of raising the benefit fund are so speculative and uncertain that the damages for a failure to collect the proceeds of an assessment cannot be measured. But it is just to presume, in favor of the beneficiary, and against the society, that every member will pay his assessment on the certificate, and to require the society to show by satisfactory evidence the number of those who would not have paid.

§ **411. Burden of proof and measure of damages continued.** The society has it in its power to demonstrate to a mathematical certainty the result of an assessment on the certificate. When a claim is made against the society on one of its contracts recognizing him as a member in good standing, the presumption is that the assured died in good standing, and the burden is on the society to allege and show the fact that he did not so die. It can, therefore, levy an assessment upon its members which they must pay within the stipulated time after notice, on penalty of forfeiture of their claims upon the society. The proceeds of this assessment may be held, pending the investigation or litigation of claim, and, if the claim is defeated, may be used in the payment of other losses. While a society might probably levy an assessment under such circumstances and conditions as would estop it from denying the validity of a claim, yet the mere levy of an assessment for a death loss, unaccompanied by any act recognizing the validity of a contract of insurance, is not a waiver of a forfeiture; and the fact that after the death of a member, the other members paid in their voluntary assessments to meet the amount of insurance, gives the beneficiary no additional rights.[1] As said by Judge Dyer in Smith v. Covenant Mutual, etc., *supra;* "if it appeared that an assessment had been levied,

[1] Swett v. Citizens Mutual etc., 78 Me. 541. 17 Atl. Rep. 394; Mayer v. Equitable Reserve, eta., 42 Hun (N. Y.) 237.

and the amount thereof had been collected, but its payment to the beneficiaries refused, there would be no doubt, in the absence of other grounds of defense, of the plaintiff's right to recover in a money action, the sum so collected, not exceeding $2,500.00." As the levy of an assessment does not of itself estop the society from setting up "other grounds of defense;" as the society can, by complying with its own agreement to levy an assessment upon its members measure accurately the damages which the plaintiff is entitled to recover, in case the "other grounds of defense" are not sustained in the suit, why should not the plaintiff "invoke any presumptions as to how many would have paid, and how many would have refused payment?"

§ 412. Measures of damages in a certain case. A mutual benefit society issued a certificate of membership, agreeing, upon the death of a member, to levy an assessment of one dollar on each surviving member, and to pay the proceeds of such assessment to his widow.

Afterward in November 1869, the member disappeared. In June 1871, the board of directors of the society, passed a resolution declaring themselves satisfied of his death, and ordering an assessment, though no regular proof of his death was ever presented as required by the contract. When the order of the board of directors was made, there were six hundred and forty-nine members, but at the time of his disappearance the membership was much larger. The widow and the society could not agree upon the amount that should be paid to her, and, on the trial of an action brought by the widow against the society, the jury, under the charge of the court, found a verdict for the plaintiff for the sum of $649.00.

On the appeal of the widow, the Supreme Court of Georgia, held that the amount of the verdict was substantially correct; that the assessment should be made on those who were members of the society at the date of the resolution of the directors, and not on such as were members at the time of the disappearance. In the opinion the court says: "Whether the defendant could have resisted the payment of the plaintiff's claim for want of the proper proof of Miller's death, if the foregoing action of its board of directors had not been taken, it is not necessary to decide; but even the action of the board of directors does not fix the time of Miller's death. Inasmuch as the plaintiff relies on this action of the defendant's board of directors to show its liability to her for the death of Miller,

the basis of her recovery should have been the number of members belonging to its company, of Miller's class, liable to be assessed at the time the defendant recognized the death of Miller, and ordered the assessment to be made, and not the number of that class, which belonged to its company at the time of the reported disappearance of Miller, in November 1869, the defendant not being satisfied from the evidence then before it (the same not being such as its by-laws required) that he was dead. The defendant is made liable, not because the death of Miller was proved in accordance with the requirements of its by-laws, but because it recognized his death in June 1871."[1]

[1] Miller v. Georgia Masonic, etc., Company, 57 Ga. 221.

Action on the Contract of the Society.—Part IV.

SEC. 413. } Effect of expulsion on the claim of an expelled member for
SEC. 414. } benefits.

§ 413. Effect of expulsion on claim of expelled member for benefits. If, before a member has been expelled from a society, he becomes entitled, under the contract of membership, to certain benefits promised by the society, his subsequent expulsion will not prevent him from maintaining an action for such benefits.[1] A legal expulsion, however, at once terminates the contract of membership, and determines the member's right to future benefits.[2]

Where a member makes a claim against a society for benefits, and is expelled because such claim is found to be fraudulent, the expulsion of the member for such cause is a bar to any inquiry by the courts into the merits of the claim. The society possessed jurisdiction of the subject matter in the proceedings in expulsion, and, in expelling the member, acted in a judicial capacity. Its decision will not be collaterally inquired into by the courts, but will be held as binding between the parties until set aside on appeal to the higher tribunals of the society, or on application for re-instatement in the courts. So long as the judgment of expulsion for presenting the fraudulent claim remains in force, the courts will regard it as settled, between the member and the society, that the claim is fraudulent and without merit. The plaintiff, a member of the defendant lodge, claimed certain benefits on account of alleged disability, but the same were denied by the lodge, and he appealed to the grand master under the rules of the order, who reversed the decision of the lodge, but the lodge appealed, under the rules, to the grand lodge; and meanwhile the defendant lodge had expelled the plaintiff for fraud and deceit practiced in his efforts to receive the benefits in question, and this action of the defendant lodge was also carried by appeal to the grand lodge, and the grand lodge considered the last appeal first, and found plaintiff guilty of fraud and deceit as alleged, and sus-

[1] Bachman v. Arbeiter-Bund, 64 How. Pr. 442.

[2] Pfeiffer v. Weisshaupt, 13 Daly 151.

tained the action of the defendant lodge in expelling him therefor, and afterward the grand lodge further refused to consider the first appeal because the merits of the cases were involved in and determined by the decision of the second appeal. The court held that these facts constituted an adjudication of the question involved in the first appeal, to the effect that plaintiff was not entitled to the benefits claimed, and that upon a showing of these facts, the district court properly dismissed the action brought to recover the amount of such benefits from the defendant lodge.[1]

§ **414. Same subject continued.** Where, by the by-laws of a mutual benefit society, it is provided that if the insured member misrepresent his habits as temperate, the board of directors, upon hearing, may drop his name from membership, the action of the board upon the charge is conclusive and *res adjudicata*, and it may not be inquired into in a suit on the certificate of membership after the death of the insured.[2]

Where a member has been expelled from a voluntary society, he may not collaterally question the rightfulness of his expulsion by a suit to recover the benefits to which he would otherwise have been entitled. He must first, if unjustly expelled, procure his restoration to membership.[3]

[1] Woolsey v. I. O. O. F., etc., 61 Iowa 492; See Society v. Vandyke, 2 Whar, (Pa.) 309.

[2] Jones v. National Mutual Benefit Association, (Ky.,) 2 S. W. Rep. 447.

[3] Anacosta Tribe v. Murbach, 13 Md. 91; Society v. Vandyke, 2 Wharton (Pa.) 309.

CHAPTER XVI.

Payment of Benefit Fund.

SEC. 415. Payment is not a gift.
SEC. 416. SEC. 417. } Payment to wrong person, rights of parties.
SEC. 418. Payment to designated beneficiary.
SEC. 419. Change of beneficiary—to whom payment may be made.
SEC. 420. Member may not enjoin payment.
SEC. 421. Payment from reserve fund, discretion of officers.
SEC. 422. Payment of money into court. Interpleader etc.
SEC. 423. Payment of less amount than is due, receipt in full, etc.
SEC. 424. Payment procured by fraud upon society.
SEC. 425. Settlement procured by fraud of society.
SEC. 426. Proceedings to obtain payment of judgment against society.
SEC. 427. Restricting operation of judgment against society.

Sec. 415. Payment of a gift. The payment by a mutual benefit society of the benefit fund to the beneficiary named in the contract of insurance is not voluntary, and in the nature of a gift. It is the fulfilment of the contract of insurance entered into, for a valuable consideration, between the member and the society for the benefit of the beneficiary. If, therefore, payment be made by the society to the wrong person, under the mistaken belief that he is the proper beneficiary, when he is not, the society may recover the money back.[1]

§ 416. Payment to wrong person, rights of parties. If a person, not the proper beneficiary under the contract of insurance, has received money paid to him in the belief that he was the proper beneficiary, the law implies a promise on his part to pay it over to the rightful owner. The beneficiary may recover from him the amount thus wrongfully received.[2]

[1] Townsend v Crowdy, 8 C. B. (N. S.) 98 E. C. L. 477; Kelly v. Solari, 9 Mees. & W. 54; Dails v. Lloyd, 12 Q. B. 64 E. C. L. 531; Appleton Bank v. McGiloray, 4 Gray 518; National Life Ins. Co. v. Minch, 53 N. Y. 144.

[2] Bolton v. Bolton, 73 Me. 299.

Where money has been paid without cause or consideration to one who was not entitled in law, honor or good conscience to receive it, the person paying it may recover it back, provided it was paid under a palpable misconception of the law essentially bearing upon and affecting the contract.

A mutual benefit society issued a certificate of membership by which it agreed to pay the benefit fund, upon the death of the member, to a person who was not a member of his family. When the certificate was issued, the officers of the society believed that it had the right under its charter to make such a contract, and, after the death of the member, they paid to the beneficiary named in the certificate the amount of the benefit fund, believing that he was entitled to it under the contract. Under the charter, the society had no power to make such a contract, for by its terms the fund was payable to the widow and children of the member taking out a certificate, and it could not be diverted from these charter beneficiaries by any act of the society or the member. Afterward the widow and children of the deceased member brought an action against the society to recover the benefit fund, and the society instituted a proceeding against the person to whom it had paid the fund to recover the amount which it had paid under a mistake of law. The court held that the society might recover the amount which it had paid to such person under a mistake of law, less the amount of all assessments which he had paid upon the certificate, and the amount expended by him in making out proofs of loss, and further held that he was chargeable with interest only from the date of the judgment.[1]

§ 417. Same subject continued. The payment by the society of the whole amount of the benefit fund to certain persons, under the supposition that they are the heirs at law of the beneficiary, and entitled to the fund, is no defense to a claim of one of such heirs, to whom no payment has been made, for his share thereof.[2]

Where the charter expressly provides that the widow and children of a deceased member shall take the benefit fund, they are entitled to it, even though the certificate is made payable to another person, and the charter beneficiaries, as between themselves and the beneficiary named in the certificate, do

[1] Gibson v. Ky. Granger's Mut. Ben Society, 8 Ky. L. Rep. (Sup'r. Ct.) 520.

[2] Mutual Aid Society v. Miller, 107 Pa. St. 162.

not waive their right to the fund by consenting that it may be paid to him, unless there is some consideration for the waiver, or something to operate as an estoppel.[1]

The innocent payment by the society of the benefit fund to the person whom the deceased member in his lifetime designated as his beneficiary and represented to be his wife, is a bar to the claim of the widow against the society.

A society was formed for "benefiting and aiding the widows and orphans of deceased members" and its by-laws provided that a member might designate his beneficiary, and if no designation were made, then the fund should be paid to the widow, child or children, mother or legal heirs, in the order named. A member, before his death, made the following direction: "The payment allowed to me by the constitution and by-laws of the grand lodge to be made to Fanny Supplee (my wife)." Under this designation, the fund was, after the death of the member, paid to the person named. This person never had, in point of fact, been the wife of the deceased member, who had been, during the whole period of his membership, married to another woman. The widow brought suit against the society for the amount of the benefit fund, and it was held that, in absence of notice to the proper officer of the society, or of the subordinate lodge to which the deceased member belonged, that she was the widow, prior to the payment to the beneficiary designated, she was not entitled to recover.[2]

Where a society has paid over the benefit fund to the assignee of a certificate on the faith of the assignment, and the original beneficiary seeks to recover the benefit fund on the ground of fraud upon the member by the assignee, before recovery may be had against the society, it must be shown that it had notice of the fraud prior to the payment to the assignee.[3]

§ 418. Payment to designated beneficiary. Where a party insures his life in favor of a person who has no insurable interest in his life, and the society pays the amount to the persons stipulated in the contract, the society will not be compelled to pay it again to the executrix of the estate, although notified not to pay the beneficiary by the heir and widow of the deceased.

[1] Gibson v. Ky. Grangers Mut. Ben. Society, *supra*.

[2] Supplee v. Knights of Birmingham, etc., 18 Weekly Notes of Cases, 280; See § 181, 239.

[3] N. W. Mutual etc. v. Roth, 87 Pa. St. 409.

A member died leaving a will in which he left all his property to his wife and grand children. There was a policy of insurance upon his life in favor of Catherine Bernhard, who had no insurable interest in his life. Notice was given by the widow and heirs to the society that they claimed the benefit fund, and that it must not be paid to the beneficiary named in the policy. But, in disregard of such notice, the society paid it to the beneficiary named in the certificate of membership. The court says: "The defendant paid the money according to the terms of its contract, and to the person named in the certificate of membership. The company did not agree to pay the amount of the insurance to the estate of the person, on whose life the risk was taken. * * * * There was no contract with the widow and heirs, and no right of action or legal capacity existed in them, as such, to collect the money or to forbid its payment to the beneficiary."[1]

§ **419. Change of beneficiary; to whom payment may be made.** In Manning v. A. O. U. W., Ky., 5 S. W. Rep. 385, it was held, that where a member had changed the designation of his beneficiary in a manner other than that provided for in the laws of the society, and the society had consented to such change, and, after the death of the member, had paid the benefit fund to the beneficiary in whose favor the change had been made, the original beneficiary could not maintain an action for the fund.[2]

§ **420. Member may not enjoin payment.** A member of the society, as such, has no interest in the benefit fund, and cannot maintain a suit to enjoin the society from paying it to a person who claims to be the beneficiary under one of its certificates.[3]

§ **421. Payment from reserve fund—Direction of officers.** The board of directors or other officers, charged with the management of the affairs of the society, and the payment of death losses, must, of necessity, be permitted to exercise their discretion to a great extent in the payment of death loses out of any reserve fund in the treasury of the

[1] Bomberger Ex't'r v. Union Ben. Mut. Aid Society, (Pa. St.) 6 Atl. Rep. 41.

[2] See Chapter XII. Part I.

[3] Elsey v. Odd Fellows, etc. Ass'n. Mass.; 7 N. E. Rep. 844; See Sands v. Hill, 42 Barb. (N. Y.) 65, at § 279.

society. Where the reserve fund has not exceeded any limit which the law may have placed upon the amount that may be held as a reserve, it must be left to the discretion of such officers, whether they will pay a loss in whole or in part from the reserve fund, or levy an assessment upon the members to pay it. The idea of a reserve fund imports permanency to some extent, and, if losses were required to be paid out of this fund as they occurred, the fund would soon be depleted and destroyed; the very object for which it was created would be defeated. A member cannot, therefore, insist that the amount of money held in the reserve fund be applied to the payment of losses before he shall be required to pay his assessment. The officers of the society may use a part or all of the fund to pay death losses, but they cannot be compelled to do so. It is in their discretion to hold the reserve fund and lay an assessment to pay the loss.[1]

A statute providing that a mutual benefit society "shall have the right to hold, at any one time, as a death fund, belonging to the beneficiaries of anticipated deceased members, an amount not exceeding one assessment," does not require that losses as they occur shall be paid from this fund, but the officers, in their discretion, may lay an assessment to pay such losses.[2]

§ 422. Payment of money into court. Interpleader, etc. An action was originally brought by the plaintiff against a mutual benefit society, to recover the sum of $3,000.00 which she claimed was due to her upon a benefit certificate of said society held by her husband, at the time of his death. The society did not dispute the indebtedness, but alleged that several other persons made claim to the benefit fund, naming such persons; asked to be permitted to pay the money into court, and that the contestants for the fund be made defendants in its place; and thereupon was permitted to, and did pay the money into court. The contestants were made defendants in its place, and the action was dismissed as to the society. In discussing the effect of this payment of the fund into court, the Supreme Court of Wisconsin says: "The fact that the association has paid the money into court, instead of paying it directly to the widow, to avoid litigation with the other claimants, can make no difference as to the

[1] Crossman v. Mass. Mutual, etc., Mass; 9 N. E. Rep. 753; See §§. 133, 134, 282.

[2] Crossman v. Mass. Mutual, etc., *supra.*

rights of the persons claiming the same. If the appellant could not have recovered this money in a direct action against the association, he cannot recover it in this action. The association not having, for prudential reasons, paid the money to the party entitled thereto, the court must see that it is paid out as directed and required by the rules and regulations of the society. * * * * It is quite immaterial whether the local council or the supreme council have the right, under the rules and regulations of the order, to direct to whom the money shall be paid, in case the brother has failed to designate the person in the manner prescribed by such rules. The money having been paid into court, the court must now determine who is the proper person to receive the money, irrespective of the action of either council."[1]

§ 423. **Payment of less amount than is due; receipt in full, etc.** The son of a member of a mutual benefit society, being in fact entitled to the whole fund payable on his father's death, his guardian, on making claim therefor, was informed by the president that only a part of fund was due to the son, and that the balance belonged to another person, who had been named as a beneficiary. The guardian, in good faith, without disputing this, accepted a smaller sum, and signed a receipt in full. The remainder of the money was then paid to the person supposed to be entitled thereto. It was held that a suit might still be maintained by the son for the balance of the fund, and that the guardian's passive assent to the payment of the balance to the wrong person did not amount to an estoppel. In such a case, the receipt of a part of the sum due is not a consideration sufficient to support a release executed by the guardian to the society in full satisfaction of the entire sum due.[2]

Where payment of a smaller amount than is actually due the beneficiary is accepted, a receipt in full given, and the certificate surrendered on the faith of the statement made to the beneficiary by the officers of the society that such sum was all he was entitled to on the certificate, the remainder due on the certificate may be recovered, if such statement is incorrect in law, and false in fact.[3]

[1] Ballou v. Gile, 50 Wis. 614; 7 N. W. Rep. 273; See Vollman's Appeal 92 Pa. St. 50; Stephenson v. Stephenson, 64 Iowa 534; Knights of Honor v. Nairn; 26 N. W. Rep. 826; Wendt v. Iowa Legion of Honor; 34 N. W. Rep. 470.

[2] Tyler v. Odd Fellows' Mutual Relief Association, Mass.; 13 N. E. Rep. 360.

[3] York Mo. Mut. Aid Ass'n. v. Myers, 11 Weekly Notes of Cases, 541.

A member of a mutual benefit society died holding a certificate which provided for the payment of $1000.00 to his widow on certain conditions. It was claimed that one of these conditions was broken, in that the member had not paid his dues and assessments promptly, and that the society was not liable to the widow on the certificate. But the by-laws of the society provided as follows: "The heirs of a deceased member, who through tardy payment has come out of benefit, can claim no more than $50.00 at the death of a male member." The society refused to pay her anything on the certificate, but paid her $50.00, and took her receipt in full of all claim upon the society. Afterward she brought an action upon the certificate, and the society set up the payment of the $50.00 in bar of the action. The court held that the receipt of this money did not prevent her from maintaining an action for the recovery of the sum actually due.[1]

§ **424. Payment procured by fraud.** Where a beneficiary procures the payment of the benefit fund to be made to him, by false and fraudulent proof of the death of the member, the member being in fact still alive, the society may maintain an action against the beneficiary to obtain the money so fraudulently obtained by him.[2]

And such action may be maintained, notwithstanding the illegality of the contract of insurance, by reason of the fact that the society was not authorized to do business in the state where it was executed.[3]

§ **425. Settlement procured by fraud of society.** Where a life insurance company, by its authorized agent, falsely and fraudulently represents to the assured's executor, whose mental faculties are at the time impaired by age, financial disasters and domestic affliction, that sufficient evidence has been discovered to avoid the policy, and that such company will contest and defeat its collection, and thereby procures a settlement of the claim and surrender of the policy, by payment of an amount grossly unjust to the estate of the assured, such settlement may be set aside, and the remainder due on the policy recovered. The fact that the insurance company paid such money to the executor a few days before he

[1] Klapka v. Order Germania, 7 N. Y. Weekly Dig. 197; See Ryan v. Ward, 48 N. Y. 207.

[2] N. W. Mutual etc. v. Elliott, 5 Fed. Rep. 225.

[3] N. W. Mutual etc., v. Elliott, *supra*.

could have legally demanded and enforced its payment is immaterial, where it does not appear that such payment constituted any part of the consideration for the settlement.[1]

But a beneficiary, who has settled his claim against the society disadvantageously, under pressure not amounting to fraud, cannot maintain an action for further recovery.[2]

§ 426. Proceedings to obtain payment of judgment. The widow of a deceased member of a mutual benefit society, having obtained judgment against the society for the amount of the benefit due her as such widow, and execution on the judgment having been returned unsatisfied, applied to the court in which the judgment was rendered for a *mandamus* to compel the society to make an assessment upon the members of the society sufficient to pay the judgment. The Supreme Court of Michigan, in deciding that such an action could not be maintained, said: "The respondent is a corporation existing under the laws of this state. The relator has obtained a judgment against the corporation, and execution has been returned unsatisfied. No further proceedings at law can be resorted to to enforce collection. Whether the corporation is solvent or insolvent cannot be made to appear until an investigation has been had. Whether the sequestration provided for under the statute, (How. St. § 8153) is proper or not, or whether resort should be had to assessments to satisfy the relator's claim, are questions that cannot be properly considered upon this motion. They necessarily involve a construction of the statute under which respondent company is organized, and a construction of the articles of association, and the by-laws made thereunder as well; and that construction will, to a greater or less extent, be modified by circumstances surrounding each particular case wherein it is sought to be applied. It is manifest that *mandamus* is entirely inadequate in this class of cases, and that equity alone can furnish the proper remedy. Sequestration can be had in no other court. The examination of the affairs of a corporation, and the legal proceeding by which its assets are taken and applied to the payment of its debts, are particularly subjects of equitable cognizance, and what acts should be done or performed by its officers in the payment of its debts can only be ascertained

[1] McLean v. Equitable Life etc. 100 Ind. 127.

[2] Maguire v. Ins. Co., 23 Mich. 105; Ins. Co. v. Brown, 33 Ohio St. 283.

and enforced when the true situation of the corporation is fully known, and its ability to pay and means of payment are judicially established. A court of equity is the proper forum for such proceedings, and the writ in this case must therefore be denied.[1]

§ 427. Restricting operation of judgment against society. After a general verdict has been rendered against a mutual benefit society for a breach of its covenant to make, levy and collect assessments on its members to pay the plaintiff's claim, it is error, in the judgment, or, after judgment rendered thereon, by order, to restrict the operation of the verdict, judgment and execution to assessments collected and to be collected by the society from its members. The verdict in such a case is the amount of damages for the default of the society, and judgment should be for that amount absolutely. Having a judgment in his favor for the amount of his damages, the plaintiff has the undoubted right to collect it by any means the law affords him.[2]

[1] Miner v. Mutual Ben. Ass'n., Mich.; 31 N. W. Rep. 763. How. St. § 8153. "Whenever a judgment at law or a decree in chancery shall be obtained against any corporation under the laws of this state, and an execution issued thereon shall have been returned unsatisfied in part or in whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the circuit court within the proper county may sequestrate the stock, property, things in action, and effects of such corporation, and may appoint a receiver of the same."

[2] Seitzinger v. New Era Life Association, 111 Pa. St. 557; McKnight v. New Era Life Association, 15 Weekly Notes of Cases, 400.

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